

No. 14695

United States
Court of Appeals
for the Ninth Circuit

MID-STATES INSURANCE COMPANY, a corporation, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
Appellants,

vs.

AMERICAN FIDELITY AND CASUALTY COMPANY, INC., a corporation, AMERICAN PLAN CORPORATION, a corporation, MARK HART, JOSEPH LOTZ, RALPH L. SMEAD and L. SUDEKUM,

Appellees.

Transcript of Record

In Three Volumes

VOLUME III.

(Pages 821 to 1241, inclusive.).

Appeal from the United States District Court for the Northern District of California, Southern Division

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MARK HART

a witness called on behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Mr. Bronson: Q. Mr. Hart, Mr. Smead on the stand earlier testified on the subject of some bill for legal services of attorney, Mr. Dusky being paid by the American Plan—a bill to Mr. Smead. Is that a true statement?

A. No, that is not true.

Q. Did you have any conversation with Mr. Smead at any time on the subject of bills for legal services?

A. Yes, but not Mr. Smead's bills.

Q. Will you state when it was that you had a conversation?

A. I am not certain of those dates, Mr. Bronson, at this time, but I had several conversations with Mr. Smead in which he——

Q. (Interposing): When was that? What year was it? [746]

A. It seems to me it was the early part of 1952.

Q. Just state the conversation with Mr. Smead on that subject, please.

A. Mr. Smead informed me that Mr. Dusky was going to withdraw from representation of Mr. Lotz unless he received some money from some quarter, and he asked me if we wouldn't advance Mr.—against Mr. Lotz' account, advance Mr. Dusky the money.

Q. Did you do it?

A. We later did.

(Testimony of Mark M. Hart.)

Mr. Bronson: That is all. No, one question:

Mr. Bronson: Q. Did you have any request from any source, or any billing, on account of services of Mr. Dusky for Mr. Smead as distinguished from Joe Lotz?

A. Yes, subsequently Mr. Smead stated that he had a bill from Mr. Dusky, and I am not sure whether the amount was \$1500.00 or \$2500.00, and asked if we wouldn't pay his legal services, and we declined.

Mr. Bronson: That is all.

Cross Examination

Mr. Garrison: Q. You told us yesterday, Mr. Hart, that you commenced your career in the insurance business in the accounting field.

A. Yes, sir.

Q. And you were an assistant supervising accountant, I believe, [747] in your first position?

A. Ultimately I became assistant chief accountant.

Q. And that included accounting procedures involving agency operations? A. Yes, sir.

Q. And insurance company operations?

A. Yes, sir.

Q. And subsequently you went on to the supervising agency of the Globe and Rutgers Company.

A. Supervising agency accounts.

Q. Supervising agency accounts? So that was still in the accounting field?

A. That is right.

(Testimony of Mark M. Hart.)

Q. And then you have moved on into the executive bent and are now and have been for several years the president of American Plan.

A. Yes, sir.

Q. That has given you, over a thirty year period, a very broad and wide experience, and, indeed, insight into insurance accounting and insurance operations, I take it.

A. I believe so, yes.

Q. You first met Mr. Lotz, you say, in May?

A. May, 1951.

Q. And how do you fix the month of May as being the month you met Mr. Lotz for the first time? [748]

A. Well, I was out here on rather an extended visit with various accounts and prospects in this area, and since Mr. Lotz was a relatively new account I called him. I fix the time because I know when I was out here.

Q. He was at that time an agent for your company?

A. Yes.

Q. And producing business?

A. Yes, sir.

Q. Is that the first investigation you made of Mr. Lotz' operations?

A. It is the first investigation I personally made.

Q. Others had been made by others in your company, had they, of Mr. Lotz and his operations?

A. Well, we have a system of drawing a credit report on every new agent, which I assume was done at the beginning.

(Testimony of Mark M. Hart.)

Q. So when you appointed Mr. Lotz in the first instance you had some background of who he was and what he had been doing and how he had been getting along?

A. We had a retail credit report.

Q. Is that all you had? A. Yes.

Q. At any rate, when you made the appointment in the first place, you knew his credit period with Mid-States was twenty-five days, didn't you?

A. No, I don't believe we did know that. [749]

Q. At any rate, you gave him the maximum credit period you had for any agent, which was seventy-five days?

A. Certainly. That is the maximum period.

Q. It is what you give?

A. I said substantially. We have a few cases where we let them have eighty-five days. That is the maximum.

Q. There was nothing particularly wrong in giving him seventy-five days—a seventy-five day credit period? That is a practice in the business that is permissible if you want to do it?

A. For general agents, yes.

Q. You say he told you when he first saw you he had been operating on last month's writings to pay this month's bills?

A. He didn't put it in those words. I found him to be rather confused as to his interpretation of the retrospective plan.

Q. You said he used the term "float".

A. Yes, sir. If I may explain?

(Testimony of Mark M. Hart.)

Q. Well, at the moment just answer the questions, if you will? A. Surely.

Q. Unless you want to explain your answers. He did use the term "float"? A. Yes, he did.

Q. Did he explain what he meant by that?

A. Later he did, yes.

Q. What did he say? [750]

A. Well, I will have to explain.

Q. Go ahead.

A. I found his interpretation and conception of the retrospective plan to be——

Mr. Garrison: (Interposing) Well, I move to strike that if the Court please, as not responsive to any question.

Mr. Garrison: Q. Just tell us what he said it was and let the court determine.

Mr. Bronson: Pardon me. I thought you gave him leave to make an explanation.

Mr. Garrison: I asked him to give the conversation, if the Court please, and not his interpretation of the conversation.

The Court: Read the question please, Mr. Reporter.

(Question read by the reporter.)

The Court: Go on.

A. I found his interpretation of the retrospective plan to be somewhat erroneous. He thought the basis of it was a float. The first time, incidentally, I have heard this word used.

At that time he told me he was—his idea of a

(Testimony of Mark M. Hart.)

float was that he could hold the money and use it for operating expenses, et cetera.

Mr. Garrison: Q. And you told him that was an unscientific and unwise course.

A. Yes, I did.

Q. Did he say he had been doing that right along? [751]

A. I can't recall that he said he was doing it right along. He was doing it currently.

Q. That had been his practice, had it?

A. Yes, I think that is right.

Q. That would mean to you, wouldn't it, Mr. Hart, he didn't have sufficient funds at the moment to pay his current bills and he had to draw on income from previously written business?

A. I think that was the indication that I had.

Q. How did you expect he would be able to pay the premiums that he collected on business written for you if he didn't have sufficient funds to finance the business?

A. For this reason, Mr. Garrison: When I left Mr. Lotz, or prior to my leaving Mr. Lotz, I impressed upon him the necessity of desisting from this practice and he assured me he would. And when he left me at the airport, he told me he was glad I had come back, and he was sure glad to know why this was unwise.

Q. Did he say what he would use for money?

A. No, but he did talk about commission earnings he had accrued on Mid-States books. He mentioned \$9,000.00 a month.

(Testimony of Mark M. Hart.)

Q. Was Mr. Cass employed by your company at that time? A. No, sir.

Q. When was she first employed by your company? A. He never was employed by us.

Q. Wasn't he employed by American Plan or American Fidelity? [752] A. No, sir.

Q. Never was? A. No, sir.

Q. At any rate, you got that information in the credit report and you knew generally something about Mr. Lotz and his agency plant before he was appointed?

A. Yes, to the limited extent of what was in the credit report.

Mr. Garrison: (Handing document to Mr. Bronson.)

Mr. Bronson: Well, wait a second while we have a chance to go over this.

Mr. Garrison: Certainly.

Mr. Garrison: Q. I show you a letter, Mr. Hart, dated in April, 1951, on the American Plan stationery, and ask you if you recall ever having seen that letter or having known about it.

A. Yes, sir.

Q. And that is the letter that was written by Mr. Sudekum, is it not? A. That is right.

Q. Who is he?

A. He was executive vice president of our company at the time.

Q. Written to Mr. Stanley B. Markel, vice president of American Fidelity and Casualty Company?

A. That is correct.

(Testimony of Mark M. Hart.)

Mr. Garrison: I ask that this be marked in evidence.

The Court: Let it be admitted and marked.

(Whereupon letter dated April 9, 1951, from Sudekum to Markel, was admitted into evidence as Plaintiff's Exhibit No. 34.)

Mr. Garrison: If I may, I would like to read this letter. It is on the stationery of the American Plan Corporation, dated April 9, 1951:

"Mr. Stanley B. Markel, Vice President
American Fidelity and Casualty Company
Insurance Building
Richmond, Virginia

Re: Joseph Lotz

Code No. 6-117-04178

Dear Stanley:

"The above account is an extremely active account in the State of California, giving us a considerable amount of premium income. The account has been with Mid-States for a great many years and has established an enviable record.

"During his visit to California recently, Mark Hart was requested to grant the account a seventy-five day premium payment addendum. We can only highly recommend you to grant this request, and we would [754] appreciate your early permission to issue the necessary addendum.

Best personal regards,

Sudekum"

(Testimony of Mark M. Hart.)

Mr. Garrison: Q. The addendum refers to a modification of your agency contract to determine the credit period, doesn't it? A. Yes.

Q. Does that refresh your recollection as to whether or not you were out here prior to May, and in the month of April or before?

A. I am completely mystified. I don't think I met Mr. Lotz before May, 1951.

Q. Does that refresh your recollection as to whether or not your company knew Mr. Lotz had established an enviable record with Mid-States?

A. That it does, yes, sir.

Q. And that is a fact, is it not, that he had established an enviable record with Mid-States?

A. That is what Mr. Sudekum says.

Q. He says you found that out.

Mr. Bronson: All it is is the statement of the writer of the letter, and we object to going any further than that.

Mr. Garrison: Q. As I understand it, you had, in July, 1951, a delinquent account with Mr. Lotz of some \$6600.00, [755] involving a reinsurance transaction? A. Yes.

Q. And that amount had been delinquent for several months? A. Yes, sir.

Q. Then I believe in the same month, earlier possibly, you had a check in the sum of \$50,000.00 returned that had been given you by Mr. Lotz, by the bank and not paid. A. That is correct.

Q. And that check wasn't paid because there

(Testimony of Mark M. Hart.)

weren't sufficient cash in the account when it was presented, to meet it?

A. Not in that sense, no, sir.

Q. You regarded that check, did you not, as a check returned for not sufficient funds?

A. No, we didn't.

Q. At any rate, it was a check that didn't get paid? A. That is correct.

Q. And that caused you some concern and alarm, didn't it, in August?

A. Sure. Any check in that amount, of course.

Q. Certainly. And that is the first time Mr. Lotz had ever given you a check that hadn't been paid? A. That is correct.

Q. I show you Plaintiff's Exhibit 28, which is the letter to Mr. Lotz, and ask you if you are familiar with that?

A. I heard tell of it, yes. [756]

Q. I didn't ask you that. I asked if you were familiar with it?

A. I am familiar with it.

Q. This letter was written by the chief accountant there, Mr. Taormina, is it not?

A. That is correct.

Q. It was to Mr. Lotz, dated August 14th, 1951: "Enclosed please find your check No. 1670 in the amount of \$50,301.88, returned to us due to insufficient funds."

I take it you place a different interpretation on the check than does Mr. Taormina.

A. I certainly do. He erred.

(Testimony of Mark M. Hart.)

Q. But it did give you some concern and alarm, at that time? A. Oh, absolutely.

Q. And that was in the fore part of August?

A. That was in July.

Q. The letter that Mr. Taormina writes Mr. Lotz is dated August 14, 1951.

A. Well, I think by that time a new check had come in and at this late date he was returning the old one.

Q. Did you have some telephone or teletype conversation with Mr. Smead at about this time in connection with this check and his overdue account?

A. This \$50,000.00 check? [757]

Q. And the overdue account?

A. Yes, I think we did.

Q. And that conversation occurred just before they came to New York to your August 13th meeting?

A. The conversation about the \$50,000.00 check occurred the latter part of July, or the moment we were notified by our bank.

Q. And you had a conversation with them just before they came to New York, on the telephone, regarding their arrival? A. That is correct.

Q. Wasn't that telephone conversation one in which Mr. Smead reported to you the real true facts regarding the Lotz account and told you they were in a very bad situation, and then you said, "Come back to New York immediately".

A. Mr. Smead reported to me that they weren't

(Testimony of Mark M. Hart.)

in a position to make this \$6600.00 payment and I said, "Come to New York immediately," yes.

Q. Didn't he make any reference at that time to the August 15th account of \$66,000.00 that was going to be due in ten days?

A. I don't remember him making reference to the item.

Q. Didn't he say they wouldn't have the money to pay the account?

A. That was obvious. They didn't have the \$6600.00.

Q. So the affairs of the Lotz agency were discussed in that telephone conversation? [758]

A. To the extent he was unable to pay the \$6600.00.

Q. And to the further extent you asked him about the August 15th payment of \$66,000?

A. I believe I said to him, "How are you going to make the \$66,000.00 payment", that's right.

Q. That's the point. So they did come to New York, and you were concerned about their position at that time? A. I was, yes, sir.

Q. Isn't it true you cancelled Mr. Lotz' account at that meeting in New York?

A. That is not true.

Q. You say Mr. Lotz told you immediately upon his arrival that he had this contract, or was negotiating one with Mid-States?

A. He said something to that effect.

Q. And that it was a better one and more favorable than he had with you? A. Yes.

(Testimony of Mark M. Hart.)

Q. And it was for that reason that you decided that you couldn't grant him any extension and wouldn't do any more business with him?

A. That was the predominant reason, yes.

Q. And you told him that on that occasion, didn't you?

A. I said, "We can't meet this deal."

Q. And that you would not be willing to write any more business? [759]

A. No, I did not say that.

Q. I call your attention to Plaintiff's Exhibit 30, which is a letter that is signed by Joe Lotz on the American Fidelity and Casualty Company stationery and addressed to the American Plan. You are familiar with that letter? A. Yes.

Q. You dictated it, didn't you? A. Yes.

Q. And you dictated it for Mr. Lotz' signature?

A. That is correct.

Q. Well, what did you mean in this letter when you said, starting out,

"American Plan Corporation, Gentlemen: Pursuant to my discussion with your Mr. Hart in New York on August 13, 1951, and particularly in view of your inability to comply with my request for a prepaid commission, I hereby terminate my agency agreement"?

A. I meant that pursuant to the discussion where he asked us for a fifteen per cent prepaid deal and I said we are unable to give it to him.

Q. You didn't actually think that the proposal

(Testimony of Mark M. Hart.)

that he had with Mid-States Company was more attractive to him than yours, did you?

A. It certainly was.

Q. Yours was a guaranteed twenty per cent commission, wasn't it, [760] regardless of losses?

A. Yes, sir.

Q. And there is a fifteen per cent advance commission subject to losses? A. Yes, sir.

Q. So that if losses were high in the instance of Mid-States Insurance Company, conceivably he wouldn't have any commission.

A. He would have his fifteen per cent on a written premium basis, giving him immediate cash.

Q. But it would be charged against him in the future if his losses were high?

A. But not permitted to be recovered, in my understanding of a prepaid commission basis.

Q. Well, you mean that they guaranteed him a prepaid commission?

A. There were two types of prepaid commission contracts.

Q. I am talking about the one involving Mr. Lotz and Mid-States.

A. At that point the deal hadn't been made, and I hadn't seen the contract, didn't know what it was all about. He talked about a fifteen per cent prepaid deal to give him cash in hand.

Q. So there wasn't then, any actual reason for you to discontinue doing business with Mr. Lotz insofar as the other arrangement was concerned because it hadn't been made.

(Testimony of Mark M. Hart.)

Mr. Bronson: That is an argument with the witness, and we object to the question. [761]

The Court: It is in the nature of argument.

Mr. Garrison: This is cross examination, and I am asking him if it isn't a fact that there wasn't any real reason for him to have cancelled his contract with Mr. Lotz because the Mid-States contract hadn't even been made.

The Court: He may answer.

A. It is true that the Mid-States contract hadn't been made, but Mr. Lotz had informed us that in discussions with some official of Mid-States—I believe it was Mr. Hatfield—he was told that he could have this deal if he went to Chicago and made it. Now, to all intents and purposes it was a deal in the works, and I said to him we couldn't give him the same deal.

Mr. Garrison: Q. And proceeded to prepare not to do any more business with him at all.

Mr. Bronson: That has been asked.

The Witness: No, that is not true.

Mr. Garrison: If the Court please, this is cross examination. I would like to be able to conduct it without asides from Mr. Bronson unless he has some specific objection to make.

Mr. Bronson: I object on the ground the question has been asked and answered, but it may be answered again.

The Court: You may answer.

A. On August 13th, Mr. Garrison, there was no

(Testimony of Mark M. Hart.)

termination or [762] thought of termination of the contract.

Mr. Garrison: Q. And it wasn't even suggested at that meeting, then, that you would terminate the contract? A. No, sir.

Q. Now, do I understand your testimony, Mr. Hart, as of yesterday to be that when Mr. Smead was in your office on August 13th he told you that the amount due the Lotz agency from sub-agents on account of premiums for business written in your company was \$140,000.00?

A. That is correct.

Q. And you emphatically deny, I take it, that Mr. Lotz, or Mr. Smead, told you the amount was \$75,000.00 approximately?

A. At that meeting, yes, I deny that.

Q. Well, in any meeting in New York?

A. Any meeting in New York.

Q. You have learned subsequently, have you not, that the true fact is that the premiums due Lotz for your company's writings were, in fact, \$75,000.00, haven't you?

A. As of August 13th?

Q. Yes.

A. No, I have not learned that.

Q. I am talking about round figures, now. I am not talking about seventy-five or eighty, I am talking about that area. You have subsequently learned it wasn't anywhere near \$140,000.00, haven't you?

A. No, I haven't.

(Testimony of Mark M. Hart.)

Q. Did you honestly think at that time it was \$140,000.00?

A. Yes. And I had very good reason to base it on, too.

Q. There is no question about that in your mind?

A. No.

Q. As I understand it, then, Mr. Lotz also told you that they were going to try to borrow \$100,000.00 from some bank?

A. He didn't mention a bank. He said that they were going to get a loan of \$100,000.00, that's correct.

Q. And that is also at the New York meeting?

A. Yes, sir.

Q. So that you knew, then, as of that date that they were in very bad financial condition?

A. I knew that they were strained from a cash standpoint, yes, sir.

Q. You knew that they owed you \$240,000.00?

A. Yes, sir.

Q. And on your own figures, they had only coming on your account one hundred forty?

A. That is correct.

Q. You knew that they owed Mid-States thirty, didn't you?

A. At that time I don't think I did.

Q. Didn't you ask him whether he owed other companies?

A. Only interested in our own balance.

Q. Well, you knew you were going to get paid, if

(Testimony of Mark M. Hart.)

at all, out [764] of income from his insurance agency, didn't you? A. Yes, sir.

Q. Didn't you consider what his obligations might be to others at that point?

A. No. We knew at that time that we were the major writer and must be the major creditor of his.

Q. But to what extent you were the major creditor you didn't take time to inquire?

A. No, sir.

Q. And you knew that he was in such shape that he had to go out and borrow \$100,000.00?

A. He told me that, yes.

Q. Well, now, that caused you very grave concern, didn't it?

A. At the inception of the meeting, yes, but not at the conclusion of the meeting.

Q. Well, he didn't have any more money at the conclusion of the meeting than when you started, did he?

A. No, he didn't it's true; but a calculation as to how he could repay us eased any of our fears about it.

Q. Did the fact that you were going to get another company to take their business and pay you the premiums have anything to do with your enlightened and benefitted state of mind?

A. No. There was no discussion about paying premiums, other companies.

Q. Now, you had been demanding financial statements from [765] Mr. Lotz ever since April hadn't you? A. At least April.

(Testimony of Mark M. Hart.)

Q. Every month? June, July—every month?

A. I don't know whether our treasury asked for it every month, but several times.

Q. Never got it? A. No, sir.

Q. I take it Mr. Smead returned to Oakland for the express purpose of proceeding with collections.

A. That is correct. He told us there was \$40,000 of the May balance of \$66,000.00——

Q. I didn't ask you that. I just asked you if *you* returned for the express purpose of proceeding with collections? A. Yes.

Q. Because you had the August 15th account coming up of \$66,000.00, plus the \$6600.00?

A. That's correct.

Q. Did you know that Mr. Will suggested in a teletype on August 16th that they arrange to have the payments to your account made automatically by the bank?

A. I believe I know something about that.

Q. Well, that would have meant that there wouldn't be any credit balance at all for Mr. Lotz, wouldn't it? A. No, that is not true.

Q. That he pay you immediately upon collecting premiums? [766]

A. No, that's not correct.

Q. Well, if the minute any funds came in to his trustee account from collections they were to be automatically transferred to your account, that would be in advance of the due date of your monthly statement?

A. Oh, I see your point, yes.

(Testimony of Mark M. Hart.)

Q. Yes, certainly. So that in effect that was an abrogation of your contract—of his contract with you, wasn't it?

A. I don't know the legal significance of abrogation.

Q. I am not asking you about legal significance.

A. Well, you're asking me about——

Q. (Interposing) Under his contract the due date would fall due the 15th of the following month, wouldn't it?

A. That is right.

Q. Seventy-five days?

A. Yes.

Q. And under the proposal that deposits be made automatically they would be paid at some time prior to the normal seventy-five day's due date?

A. That requires an explanation, Mr. Garrison.

Q. All right.

A. May I?

Q. Certainly.

A. The trustee account of the Lotz agency was at the Central Bank, and some time in the early part of August—I believe [767] August 1st or 2nd—pursuant to Mr. Sudekum's recommendation, resulting from his visit here in July, Mr. Will asked Mr. Lotz in future that deposit checks be deposited directly to the AFC account in the Central Bank rather than mail them to New York.

Q. Automatically?

A. I am not sure whether he said in that letter automatically. I'm talking about the letter now, Mr. Garrison.

Q. Well, I am talking about the teletype.

(Testimony of Mark M. Hart.)

A. Well, I was explaining and I would like to take it chronologically.

Now, since both the trustee account and the AFC account were in the Central Bank, we asked, I believe, according to that teletype, that the bank make automatic transfer of funds from the trustee account to the AFC account.

Q. All right.

A. But with regard to the abrogation of the contract, that would only ensue if he collected the money more rapidly than seventy-five days.

Q. That's right. If he did collect more rapidly than seventy-five days it would mean a change in his contract relation with you.

A. To that extent it would, certainly.

Q. Certainly. To that extent. So that wasn't that an evidence that you treated his agency contract as having been terminated [768] August 13th in New York?

A. No.

Q. It wasn't?

A. No.

Q. All right. As I understand it, your arrangement with Mr. Lotz was that he was to pay you in full the \$240,000.00 balance due by the 15th of the following month, some three weeks later.

A. That was the language of the agreement but, as I said yesterday, it was psychological.

Q. Well, that was certainly a clear abrogation of the contract, wasn't it?

A. That agreement was made on August the 22nd after the contract was terminated.

(Testimony of Mark M. Hart.)

Q. And that was a clear abrogation of the contract?

A. Can you abrogate a terminated contract?

Mr. Bronson: Excuse me——

Mr. Garrison: Q. There is no question but as of that time the contract was definitely terminated?

Mr. Bronson: Excuse me. I object to the attempt to use the word “abrogation” with this man. He is a layman, doesn’t know about the law. The facts are the things, not a conclusion to be drawn. We object on that ground.

Mr. Garrison: Q. Now, Mr. Hart, you came up to Oakland with Mr. Feller, you said, arriving here August 20th? [769] A. Yes, sir.

Q. I take it Mr. Smead’s efforts at collection had not been very successful up to this point?

A. That’s correct.

Q. In fact, he had only collected \$8,000.00?

A. I believe he only deposited \$8,000.00 for us.

Q. And you were pursuing him on the teletype the very day following his leaving your office in New York on the subject?

A. I am not sure if it was the next day.

Q. But it was before your arrival, you were following up on collections with Smead?

A. I also don’t know whether it was me, personally. I believe I was away at the time.

Q. Well, if it were done, it was done under your stewardship? A. Certainly.

Q. It would be the same thing.

A. Certainly.

(Testimony of Mark M. Hart.)

Q. You brought Mr. Feller along, I think you said, as an incidental aspect of this matter?

A. Well, incidental to the extent that we both had something to do in Los Angeles. I asked him to come along with me.

Q. So that this wasn't your primary purpose, the Lotz situation?

A. No, I wouldn't say that.

Q. Well, you are not sure whether it was or not? [770]

A. I mean, I think the two purposes were equally important.

Q. Well, what was your other business interest?

A. Is that——?

Q. If you don't want to say, just say you don't care to say.

A. I don't mind telling you.

Mr. Bronson: You mean the business in Los Angeles?

Mr. Garrison: Yes.

Mr. Bronson: I think that is irrelevant.

Mr. Garrison: I think it is, too. I think it is objectionable.

Mr. Garrison: Q. The fact is, however, that you charged Mr. Lotz' account \$5,000.00 for your expenses and legal fees on this trip to Oakland for two days, didn't you?

A. I am not sure of that figure, but it was three days.

Q. Well, three days. A. Yes.

(Testimony of Mark M. Hart.)

Q. Let's not quibble over a day, an extra day or three days. You did charge him \$5,000.00?

A. I am not sure of that figure. I have nothing before me.

Q. And when you got out here you found the \$66,000.00 couldn't be collected at that moment, hadn't been collected?

A. Hadn't been collected, yes, sir.

Q. And Mr. Smead assured you in teletypes and when you arrived that he had done everything he could.

A. Said he had been working on it. [771]

Q. Working hard. One of those collections was with another Smead down in Santa Monica and he had been after him?

A. That was a rather substantial one, yes, sir.

Q. And I assume that that disclosure and that fact augmented or heightened your concern over this situation at that time?

A. It was a matter of concern, yes, sir.

Q. And I say it heightened and augmented your concern over even what it had been in New York?

A. In New York I had no concern.

Q. You said you were concerned when the check bounced.

A. Yes, but that was cleared and it didn't bounce for insufficient funds.

Q. They told you in New York that they couldn't make the August 15th payment of \$66,000.00? You knew that? A. At that moment, yes.

Q. So that why your concern be so much greater

(Testimony of Mark M. Hart.)

in Los Angeles, or in Oakland the following week, when the same facts were known to you then?

A. My concern only became real, Mr. Garrison, after Mr. Smead returned to Oakland, when he failed to collect the \$40,000.00 outstanding of the \$66,000.00 May balance.

Q. All right. So that we are in agreement on this much, that at least when you were in Oakland your concern was very great.

A. I was concerned while I was in Oakland.

Q. And didn't you take steps to learn what the condition of [772] the Lotz agency was in the light of your concern?

A. Take steps to what degree, Mr. Garrison?

Q. To any degree? To learn the financial condition of Mr. Lotz' agency.

A. Yes.

Q. You are an accountant?

A. Yes.

Q. You know what accounts payable and accounts receivable are?

A. Very well.

Q. Didn't you take steps to find out exactly who he owed and how much he owed and what he had coming?

A. I think we did.

Q. How did you go about doing that?

A. Just a verbal conversation, oral conversation.

Q. Didn't you look at the books?

A. Never saw his books.

Q. Didn't you have anybody look at the books?

A. No, sir.

Q. Didn't you ask him to get someone to give you some figures from the books?

A. Yes.

Q. Who was that?

(Testimony of Mark M. Hart.)

A. I asked Mr. Smead to have his girls give me a breakdown by sub-agents of the amounts due by sub-agents on our business. [773]

Q. Did they do that?

A. Oh, time would not permit them doing it during my visit.

Q. You didn't get those figures?

A. No, sir.

Q. You are sure of this?

A. I am sure I didn't get it.

Q. And that is all you asked for?

A. I believe I asked him other questions related to the general subject.

Q. I know, but didn't you ask him to get you any other figures from the books? A. No.

Q. You just wanted to know, I take it, how much money Lotz had coming on business written in the American Fidelity and Casualty?

A. That was the crux of it.

Q. And you didn't learn what that was?

A. I was told orally it was \$140,000.00.

Q. And you believed that?

A. Oh, yes, I had every reason to believe it.

Q. And you didn't learn any different figure at that time?

A. I believe Mr. Smead at that time said \$75,000.00. I told him that was ridiculous and that he had said one hundred forty in Oakland, and he said, "Yes, it is 140,000."

Q. You weren't concerned about how much he owed other [774] companies?

(Testimony of Mark M. Hart.)

A. Frankly, no.

Q. "Frankly, no." I will show you a copy of a two-page statement on the stationery of American Fidelity and Casualty Company, and it has columnized the names of people and amounts of money set opposite each name, and I will ask you if you have ever seen that before?

A. This is not the stationery of American Fidelity and Casualty Company.

Q. I didn't ask you that question. I simply asked you if you had ever seen that paper before?

A. I believe I saw this statement in a review of the papers you submitted under the Court order.

Q. Is that the first time you had ever seen it?

A. I believe it was.

Mr. Bronson: Counsel has handed me a three-page document, and I suggest we have time to read it, if the Court please.

Mr. Garrison: Let me interrupt. I will come back to this later and you can read it during the recess.

Mr. Bronson: Thank you very much.

Mr. Garrison: Q. I am going to digress now from this question of, the \$140,000 receivables that you say were due, and that you were certain was the amount, and was reported to you in Oakland, and I am going on to another subject and come back to it.

I believe you said you did receive information when you were here in Oakland about the proposal to take over some Public Service business.

(Testimony of Mark M. Hart.)

A. By Mid-States, yes.

Q. And that was discussed a number of times while you were out here?

A. I know it was discussed while I was here. I don't know if it was a number of times.

Q. And as a matter of fact the contract or commission arrangement made with the Russell and Bond Company was made on the very night you left, August 20th, wasn't it—August 22nd, wasn't it?

A. That might be. I left on the morning of the 22nd.

Q. Well, on the night of the 21st. The night before you left you closed the deal with Public Service Company to take over that business?

A. I am not certain.

Q. Including the commission payment with Russell and Bond, the Public Service managers?

A. I am not clear on that fact, Mr. Garrison.

Q. Regardless of the clarity of your recollection, you do know that you were present when they had the document in their hands and discussed it and showed it to you, you had closed the deal with Russell and Bond. [776]

A. No, sir.

Q. Do you deny you ever saw the contract?

A. I am certain I never saw it.

Q. But you did know that they did close it that night?

A. No, I don't know that they closed it that night.

Q. You just knew they were making one?

(Testimony of Mark M. Hart.)

A. Well, as a matter of fact, on the 20th when they discussed it with me I was under the impression it was already closed.

Q. And they told you they were going to pay a commission to Russell and Bond for the business, didn't they, of that 25 per cent?

A. Yes, they did.

Q. And did they also tell you they were going to have Russell and Bond do the physical work of rewriting the policies and pay them ten per cent for that?

A. No, I learned that later. They didn't tell me that.

Q. They didn't tell you that? Did they tell you that the gross premium on that business was 150,000?

A. They said approximately 150.

Q. And that if they had to pay a 25 per cent commission for the business, that would involve a payment to the manager of Public Service of 25 per cent of 150,000?

A. In effect, yes.

Q. That would be what? \$37,500? [777]

A. Yes.

Q. So then you left on August 22nd, and up to this time the best Smead had been able to do by way of collections was \$8,000?

A. Not as of August 22nd, no, sir. Mr. Lotz had \$30,000 in the trustee account.

Q. And you got 24 of it? A. Yes, sir.

Q. And immediately thereafter the frequency and the size of the collections and the payments to you increased tremendously, didn't they?

(Testimony of Mark M. Hart.)

Mr. Bronson: Well, that's a relative term. We have the records, I think, of all of them.

Mr. Garrison: Well, we will get to the records. He knows what "tremendously" means.

The Court: State whether or not they increased.

Mr. Garrison: Q. They increased very substantially?

Mr. Bronson: Same objection. Just going in the back door.

A. Some of the payments were very small. Others were an increase over what they had been.

Q. And the frequency increased very substantially?

Mr. Bronson: Same objection to the argument about "very substantially".

Mr. Garrison: Very well, I will withdraw the question. [778]

Q. You followed the subject of collections very closely, didn't you? A. Very closely.

Q. And you knew and either received or asked for information every day about when the deposits in your account were going to be made?

A. At least once a day.

Q. So that the first deposit that was made to your account after you left was made on August 25th in the sum of \$4,304, was it not? If you can't recollect—— A. Yes, I think——

Q. ——your counsel has the transcript of the teletypes and they are all disclosed.

A. I do recall that.

Q. You do recall that? A. Yes, sir.

(Testimony of Mark M. Hart.)

Q. And then on the 29th you had a discussion about the \$30,000 deposit?

A. I think we had a phone conversation on the 29th.

Q. And you also had a teletype message back and forth about, "Where is the \$30,000"?

A. Yes.

Q. And that was deposited to your account?

A. Yes.

Q. And on the same teletype on the 30th they reported a [779] \$1,450 payment to you?

A. I recall that.

Q. You recall that? By the way, did you know that during this same period of time that these deposits were being made in your trustee account that they were also mailing to your office certain checks, physically, and not depositing them, making payments directly to you?

A. Premium checks?

Q. Yes, sir.

A. No, sir, I don't know that.

Q. You have learned that, haven't you, that your Company received in direct payments, not deposited to the trustee account, some \$34,000?

A. Subsequent to August 15th?

Q. In September.

A. No, I haven't learned that.

Q. Didn't you ever look at Mr. Horton's audit report?

A. I believe I have looked at it, but I don't recall that figure.

(Testimony of Mark M. Hart.)

Q. Well, I will call your attention to page 13, Mr. Hart, and ask you if you are not familiar with the fact that under payments made to American Fidelity and Casualty, there is shown a payment direct of \$34,000. A. Yes, there is.

Q. Does that refresh your recollection?

A. Yes, it does.

Q. That there were payments made to your company that didn't [780] go through the trustee account? A. Yes, it does.

Q. And are you also familiar with the fact that as of those payments \$10,100 were payments that had been collected by Lotz on business written in Mid-States Insurance Company?

A. No, I am not certain of that at the moment.

Q. You saw it in the report?

A. Just this minute? No. I looked at the \$34,000 figure.

Q. You didn't see that?

A. No. I would like to see it again.

Mr. Bronson: There is a difference between what the report shows and——

Mr. Garrison: (Interposing) He's an accountant, he can dispute it if he wants to.

Mr. Bronson: Please——

Mr. Garrison: Q. Over at the left——

Mr. Bronson: Mr. Garrison, I hate to interrupt you. Will the witness be careful, when he is asking the witness whether he knew this or that, whether he knew it after he read this report made up a year or two later, or whenever it was, or as of the time

(Testimony of Mark M. Hart.)

the collections were being made. We might have a record here that just isn't illuminating at all.

Mr. Garrison: I am talking about an Exhibit in this [781] case. If it isn't illuminating, I think it would have been mentioned at the time we offered it in evidence.

Mr. Bronson: I am going to say this: We will object as incompetent, irrelevant and immaterial to anything that the witness learned from examination of the report of Lester, Herrick & Herrick long after this matter was concluded, long after the year involved. He can look at that and learn a lot of things, but what that is isn't going to help us here.

Mr. Garrison: If he did not learn it, all he has to do is say so.

Mr. Bronson: Yes.

Mr. Garrison: Q. Is it a fact that you did know of that \$34,000 that was paid directly to your Company in the month of September, that \$10,100 of it involved premiums of Mid-States business?

A. I knew it only to the extent of looking at the report of your auditor.

Q. You were following these collections very closely, day to day? A. Very closely.

Q. And you knew these direct payments were coming in?

A. I am not certain that I did know that.

Q. Didn't you get a statement of the account?

A. My treasurer would advise me almost daily, or every other [782] day, as to how much had been

(Testimony of Mark M. Hart.)

collected. But I don't believe that I ever asked him what was received in deposit slips and what was received in checks. That wasn't important.

Q. Well, here's a teletype on the 29th of August, addressed to you personally, and it says, "Have you received deposit slip covering commission check in the amount of \$4,304 in the Central Bank?" And you say, "Yes, we have." That's to you, not your office.

A. Excuse me, Mr. Garrison, did you say commission check? Oh, deposit slip.

Q. Deposit slip.

A. Yes, and I said, "Yes." That's right.

Q. And then you replied, "Ralph Smead: What about \$30,000 deposited 8/29?" That's your own handiwork.

A. Yes, sir.

Q. And then he says, "I will have that cleared for deposit in your account this afternoon or tomorrow," and then you go on to refer to another deposit of fourteen fifty and also thirty thousand?

A. Yes, sir.

Q. But you didn't make any inquiry in respect to these receipts direct as to whose money it was?

A. Well, it was immaterial as to whether the money was deposited—

Q. (Interposing) Oh, that isn't what I asked. I asked if [783] you made any inquiry?

A. No, I didn't.

Q. All right, that's the answer.

You said yesterday that, in explanation of this inquiry as to the address of the Public Service In-

(Testimony of Mark M. Hart.)

insurance Company, that you were getting suspicious about something. Will you tell us what that testimony was?

A. Well, I was wondering whether or not the deal had actually been made to rewrite \$150,000.

Q. Deal with whom?

A. That Mr. Lotz' office had negotiated between Mid-States and Public Service, and I had the thought that I would check with them to see if they had this deal, but as I said, I never did.

Q. Well, how did you check with Public Service as to what arrangement Lotz had with Mid-States?

A. I would simply call Public Service and ask them if they were cancelling and rewriting business with Mid-States as I had been told.

Q. But you knew the cancellation would be handled through Lotz' office?

A. But Public Service would first have had to indicate which ones they wanted to cancel so that if there was a deal Public Service would know about it.

Q. Public Service would know what Lotz' arrangement with [784] Mid-States was?

A. No, I think you are misinterpreting me. Before Mid-States could rewrite the business, Public Service would have to cancel.

Q. Certainly.

A. My concern was whether or not the deal had been stopped in the middle, or whether or not Public Service was going to continue to write.

Q. Didn't it occur to you to call Mr. Hatfield,

(Testimony of Mark M. Hart.)

your friend, and ask him whether or not he had a deal to take the Public Service business?

Mr. Bronson: I object to the form of that question. Maybe you should ask if he was a friend. That is in doubt at the moment.

Mr. Garrison: I think that is frivolous, if the Court please. Of course he knows who I mean, and he said in his telephone conversation he was a friend. At any rate, let's forget about it.

Q. Whether he was a friend or not, did it occur to you to call Mr. Hatfield and ask him, the party involved, if they had a contract to take over that business?

A. No, but I'm not talking about whether they had a contract or not.

Q. Or arrangement, or an understanding?

A. I am not talking about that, either. [785]

Q. Well, let's find out what we are talking about. You said you wanted to get the Public Service Company's address?

A. Yes, that's right.

Q. To find out if Mr. Lotz had an arrangement with Mid-States Company to take the Public Service business, is that what you said?

A. I am not sure if I used those words.

Q. Well, put it in your own words.

A. All right. Primarily what I was concerned about was Public Service didn't start to cancel and rewrite in Mid-States, and yet for some reason or other stopped before the \$150,000 was written.

Q. Why did they stop?

(Testimony of Mark M. Hart.)

A. Why, there could be many reasons why they would stop.

Q. They would stop principally because Mid-States would stop it, didn't they?

A. That would be one reason why they could stop.

Q. Didn't it occur to you that you might check with Mid-States to see if they knew about this?

A. No.

Q. You knew that Mr. Lotz had authority under his contract to take this business and put it in Mid-States Insurance Company without their knowing it?

A. Any general agent has that right.

Q. Right. And you knew that Public Service were in trouble [786] with the Insurance Commissioner and were anxious to get rid of this business because they were short of surplus?

A. I had been told that.

Q. So that there wouldn't be any occasion on their part to stop this rewrite? They were delighted with it, weren't they?

A. There could be occasion for them to stop. They could have made another deal with another company for 30 percent commission in the meantime.

Q. But at any rate, you wanted to get the address of Public Service company to ask them if they knew any reason why——

A. (Interposing) I had that thought in mind.

Q. It didn't ever occur to you to call up Mid-States?

A. I don't believe it did.

(Testimony of Mark M. Hart.)

Q. And you knew that Mr. Lotz was in financial difficulty and you were greatly concerned about it, weren't you, at that very moment, and had been ever since you had been in Oakland on August 20th?

A. I knew that Mr. Lotz was financially strained, yes.

Q. And you were greatly concerned?

A. I was concerned about collection of my premiums.

Q. All right. Now, on September 4th, you got \$6400 from Mr. Lotz, did you not?

A. I don't recall that.

Q. Well, your counsel has this transcript of the teletype. [787] That is on page 8, top of the page. Top of page 8, September 4th. Teletype. I don't want to read all these.

"Ralph Smead to Mark Hart: Deposited \$6,480 account of American Fidelity & Casualty Company this date," do you remember that?

A. I do now that you mention that.

Q. All right. And on September 6th, two days later, they reported that they deposited \$4,157?

A. If that is what it says.

Q. Do you remember it?

A. Oh, I don't remember every figure, no.

Q. On September 13th they advised you that they deposited \$5,119, do you remember that?

A. Not the figure, but if the record says so, that's all right.

Q. And on September 14th they reported that they had deposited \$5,000?

(Testimony of Mark M. Hart.)

Mr. Bronson: What page is that on?

Mr. Garrison: That is proceeding over to page 9.

Mr. Garrison: Q. I would like to call your attention to this particular teletype, Mr. Hart, and ask you if you will read that one?

A. I was trying to figure out who it is addressed to. It is addressed to me, apparently, from Ralph Smead. "Will not make deposit until after three o'clock today. Have approximately \$5,000 regular and will make transfer from [788] other funds."

Q. "And will make transfer from other funds." What did you think he meant by that?

A. Could be anything. Could be the trustee account fund.

Q. Didn't you know what he meant?

A. No.

Q. Didn't you ask him what he meant?

A. No.

Q. Didn't it occur to you that he might be taking somebody else's premiums and putting in your account?

A. No, it didn't. He had enough receivables of ours to collect.

Q. Did it occur to you somewhat strange that this sudden flood of money had started coming in?

A. No. I expected it.

Q. Well, Mr. Smead had great difficulty collecting any more than \$8,000 before you arrived there and before the Public Service deal was made?

A. That is true.

Q. As soon as the Public Service deal was made

(Testimony of Mark M. Hart.)

these very substantial collections started coming into you? A. That is correct.

Q. And on September 17th you received \$8,300?

A. If that's what it says, yes.

Q. And on the 14th you wired Mr. Smead that this is the [789] day before the deadline and \$190,000 has got to be raised, didn't you?

A. That is correct.

Q. And on the 17th you got \$8300, and on the 17th another deposit of \$7800?

A. That is what it says.

Q. And then on Saturday you received a deposit of \$60,000, didn't you? A. Saturday?

Q. Saturday, September 18th?

A. Our offices are not open on Saturday.

Q. All right, they deposited on Saturday out here? A. Yes.

Q. \$60,000? A. I heard we did.

Mr. Bronson: On Saturday?

Mr. Garrison: The teletype says Saturday.

Mr. Garrison: Q. But it doesn't make any difference whether Saturday or Friday, the fact is you got \$60,000 from Smead at that time, didn't you?

A. That is correct.

Q. And it didn't occur to you at that time that that might have had something to do with the \$150,000 they were going to get from Public Service?

A. No, sir, it didn't. [790]

Q. You thought they had gone out and collected that sum from all the sub-agents they had around?

A. Well, there was one sub-agent in particular

(Testimony of Mark M. Hart.)

I was sure of at the time owed them 50 to \$70,000.

Q. Well, you say you were somewhat suspicious a little bit before this, but still when this \$60,000 check came in your suspicion was no greater than it had been before?

A. Suspicious about what?

Q. About the fact that maybe Lotz didn't have the deal he said he had with Mid-States Insurance Company?

A. That \$60,000 didn't change my thinking.

Q. That didn't increase your suspicion?

Now, calling your attention to the exchange of teletypes that you had on August 30th—Mr. Bronson asked you about them yesterday.

Mr. Bronson: What is the page?

Mr. Garrison: Page 6, at the bottom of the page.

Q. And you say, "How about funds of \$1,450 which you received last Friday? Also, has check of \$30,000 actually been deposited bank A.F.C. account". Did you think that might be collections from anyone of Lotz' agents other than Public Service?

A. Oh, yes. I thought that might be collections in part.

Q. Mr. Smead says, "Answer to both questions, checks are payable to Mid-States Insurance Company awaiting authorization [791] required deposit. We are advised by that company authorization has been forwarded to us. That is the only hold-up, but has been definitely cleared. After your telephone

(Testimony of Mark M. Hart.)

conversation yesterday with Smith, everything is much better."

Now, did you still think that that \$30,000 they were talking about was money other than Public Service money? A. Yes, I did.

Q. What did you think the authorization of Mid-States had to do with it?

A. Well, of course I was anxious to get the Mid-States checks free for Joe Lotz' deduction of commission of 15 percent. That is, the Public Service checks, rather.

Q. They are talking about depositing \$30,000 in your bank account.

A. That's right. But 15 per cent of 150 alone would be 22,500, apart from any collections he made on our business.

Q. Did he get to take that out of the premiums on the very first collection?

A. That's the point. If the premiums were made—if the checks were made payable where he could use them, he could deduct it, yes.

Q. Before commission on collections, even though the collections had not been made?

A. No, sir. To the extent of whatever amount he received, if he were permitted to deduct it, he could deduct 15 percent. [792] Now, the \$30,000 could have several components in it. Partly his commission on Public Service business and partly our collections.

Q. You know, do you not, that the first check

(Testimony of Mark M. Hart.)

What was made by Public Service was made payable to Joe Lotz? A. I heard that, yes, sir.

Q. And then they stopped payment on it?

A. I heard that.

Q. And issued it to Mid-States? A. Yes.

Q. Your wire continues and says, "Understood Public Service checks were to be made payable to Lotz." That is your teletype.

A. That's right. He told me that.

Q. "Has this procedure been changed?"

A. Right.

Q. And they say, "First check payable to Mid-States." They mean first check payable to Lotz I take it. That's a typographical error. "However, this has been changed and if we do not receive authorization right away from them we can have reissued."

What difference did it make how the checks were made payable insofar as the commission they were going to get is concerned? They could have deposited them whether they were made payable to Mid-States or to Lotz, couldn't they? Why were you interested in how these checks were to be made [793] payable?

A. For this reason: Mr. Garrison, if they were made payable to Mid-States and he had to pay the entire gross, that is, 100 percent of the rewritten premium to Mid-States, they could very well apply his commission to their balances. I wanted that commission to be applied to our balances.

Q. Well, if they were deposited in his trustee account he could have disbursed them in any way

(Testimony of Mark M. Hart.)

he wanted to, couldn't he?

Mr. Bronson: It is getting to be argumentative, I think.

Mr. Garrison: I think we know what we are talking about. This is cross-examination and on a very critical point.

The Court: I realize that it is cross-examination, but you can't be argumentative.

Mr. Garrison: I don't want it to be, but I do want an answer.

Q. The fact of the matter is that the way the checks had been made, whether Mid-States had authorized endorsement of the checks or not, had nothing whatever to do with Mr. Lotz paying you his commission out of his trustee account if he had gotten the money in?

Mr. Bronson: Is that a question?

The Witness: May I have that question again? I don't quite follow it.

The Court: I suggest you reframe your questions. We [794] will take a short recess.

(Short recess.)

Mr. Garrison: Do we have a question pending, or do we have an answer?

The Court: It was suggested you reframe your question.

Mr. Garrison: I think that's right. Well, let's drop the question and come back to it later. I think that's a good idea.

Q. I would like now, Mr. Hart, to return to this important subject of the accounts receivable in Lotz'

(Testimony of Mark M. Hart.)

office on account of the American Fidelity writings in August of 1951.

You have expressed yourself as knowing that they were 140,000, and Mr. Smead told you they were 75, and I asked you if you knew that the ultimate fact turned out that they were actually 75, and you said you didn't know that.

Before I pursue that subject let me ask you that the importance of this subject—see if I am correct—the importance of this subject is the fact that you used the figure 140,000 in demonstrating the way in which Mr. Lotz was able, or you thought he would be able from his collections to pay your account of \$240,000, is that true?

A. That was a component part of it, yes.

Q. One of the elements. And the other was the credit you were going to give him on his earned commissions, and [795] then he was going to borrow some money.

A. And several other elements.

Q. Now, I want to call your attention to this letter dated August 29th from you to Mr. H. M. Will, as an interoffice communication consisting of three pages, and ask you if you have seen that before and if in fact that is not a letter that you wrote to Mr. Will?

A. This was an interoffice communication I wrote to Mr. Will.

Q. And Mr. Will was treasurer of your company?

A. Yes, sir.

Mr. Garrison: I ask that this be received in evidence as Plaintiff's Exhibit next in order.

(Testimony of Mark M. Hart.)

The Court: It may be admitted and marked.

(The letter above referred to was admitted in to evidence and marked Plaintiff's Exhibit 35.)

Mr. Garrison: This interoffice communication was written shortly after you returned from Oakland in August, 1951, was it not? A. Yes, sir.

Q. August 29th? A. Yes.

Q. Within a week. And this entire three pages deals with your trip to Oakland and the Lotz account, does it not? A. Yes, sir. [796]

Q. I want to read you one paragraph here, Mr. Hart, and it is a paragraph fourth from the bottom appearing on the second page.

Mr. Garrison: And incidentally, your Honor, this is a letter which was furnished us by counsel for defendants under our order to produce.

Q. The fourth paragraph from the bottom, page 2:

"At the present writing there are premiums outstanding of \$70,000 due Joe Lotz from sub-agents and applicable to policies to the American Fidelity & Casualty Company. I have instructed Smead to either effect collections within a reasonable time or, failing to do so, cancel the individual policies for non-payment of premiums. In any event, we are assured of an additional \$70,000 credit either by cancellation or collection."

Did you write that? A. I did, yes, sir.

Q. And was that true when you wrote it?

A. As of August 29th, yes, sir.

(Testimony of Mark M. Hart.)

Q. Had there been collected between August 20 and August 29th a hundred and forty—I should say \$70,000 in premiums and paid to your account?

A. There had been collected or cancelled approximately that [797] amount. \$30,000 was deposited the day before, purportedly.

Q. Don't you think it is a rather strange coincidence that when Mr. Smead was in New York he told you the accounts receivable were \$75,000, he told you when you were in Oakland they were \$75,000, the auditor finds as a matter of fact that they were \$75,000, and that you reported to Mr. Will a week later that they were \$70,000? Don't you think that is a strange coincidence?

A. No, I don't. On August 13th it couldn't have been less than \$140,000.

Q. Now, I show you a statement that I asked you about earlier and you said you saw it in the material we furnished you under your demand.

A. Yes, sir.

Q. Is it not a fact that this is a statement showing the accounts of sub-agents that Mr. Lotz had and the balances due from them, and the balance shown on this tabulation is \$71,642.

A. That is what it says.

Q. And you say that that is not the fact existing at that time? A. I say it couldn't be.

Q. And you didn't receive this document?

A. To the best of my recollection, no.

Q. Well, you certainly would have recollected if you had [798] received it, wouldn't you?

(Testimony of Mark M. Hart.)

A. Not necessarily. It is three years ago.

Q. The subject was of very great importance, and you were in Oakland for the very purpose of working on it.

A. Well, I have seen hundreds of documents relating to this case, Mr. Garrison, and to the best of my recollection I have not seen that one.

Q. Well, we will pursue that a little more later on. But now let's get back to the subject of this interest that you had in how the Mid-States checks were to be endorsed and in which account they were to be deposited.

As I understand it, your sole interest was in seeing that Mr. Lotz paid you his commission because of his writing that business in Mid-States Insurance Company?

A. And on any other business in Mid-States, yes.

Q. Well, in these teletypes we are talking about Public Service, aren't we?

A. I believe so, yes, sir.

Q. Yes. Well, now, let's just do a little arithmetic, Mr. Hart. You knew that Mr. Lotz had arranged to take that business from Public Service to the extent of about 150,000 gross premium, didn't you?

A. That is correct.

Q. And you knew that on August the 22nd when you were in Oakland? [799]

A. Yes, sir.

Q. And you knew he had to pay Russell and Bond, Public Service managers, 25 percent commission to get the business?

A. I heard that.

(Testimony of Mark M. Hart.)

Q. You testified before recess you knew it. And that was \$37,500? A. Yes.

Q. And you knew under Mr. Lotz' contract with Mid-States he was only permitted to retain as advance commission 15 percent of premiums written for them, didn't you? A. That is correct.

Q. So that the only way he could have taken the Public Service business and handled it according to his contract would have been to have advanced to Russell and Bond, managers, the commission he had agreed to pay them?

A. Not necessarily, no, sir.

Q. Well, if he were going to pay them 25 percent commission, he would have to pay them 25 percent commission.

A. The Company might pay it. Public Service deducted 25 per cent from us when they ceded our portfolio.

Q. I am not asking you about that. That was a different kind of transaction. I am asking you about this particular transaction. Mr. Lotz agreed to pay Russell and Bond 25 percent commission, didn't he? You have answered that yes? [800] A. Yes.

Q. And he could only retain from Mid-States fifteen per cent advance commission?

A. That is right.

Q. So he would be out-of-pocket the difference between the fifteen per cent advance commission and the twenty-five per cent he had to pay Russell and Bond, wouldn't he?

A. That is not necessarily so.

(Testimony of Mark M. Hart.)

Q. In any case, he didn't have any funds at that time with which to pay Russell and Bond, did he, because you had gotten them all?

A. But it isn't necessarily so that he would have to pay the fund to Russell and Bond.

Q. Well, who would pay it for him?

A. Suppose Mid-States agreed to take seventy-five per cent premium dollar. I don't know.

Q. Well, that would be rather rank speculation, wouldn't it? A. No, sir.

Q. Are you seriously telling this Court that you think an insurance company would allow their sub-agents to write business with a twenty-five per cent commission, having only a fifteen per cent advance, and still assume an additional twenty-five?

Mr. Bronson: I object to the form of the question. Pretty serious—. He is under oath here and making the statement.

Mr. Garrison: All right. [801]

Mr. Bronson: It is argumentative.

Mr. Garrison: All right.

Mr. Garrison: Q. But, anyway, that is your testimony, that you didn't think Lotz was going to pay the commission, is that right?

A. Never occurred to me that he would pay the commission.

Q. That didn't occur to you? A. No.

Q. You didn't inquire who was going to pay it?

A. No.

Q. You knew he didn't have the money?

A. Why, I knew he wasn't very liquid.

(Testimony of Mark M. Hart.)

Q. Well, you knew that they had scraped the bottom of the barrel up to the time you got there and only got \$8,000? You knew that all right?

A. Yes, sir.

Q. And you knew they hadn't been successful in making any loan with a bank?

A. Oh, to that point, I knew that too, yes, sir.

Q. And you had helped them try to get a loan at the Central Bank yourself, hadn't you?

A. Yes.

Q. And were unsuccessful?

A. It wasn't denied.

Q. But it wasn't made? [802]

A. Up to that point, no, sir.

Q. Well, by that 17th of September you had been paid approximately \$144,000, hadn't you?

A. I am not sure of that date or figure, Mr. Garrison.

Q. Well, I ran a tape on these figures last night, and ask if you can look at that tape and see if that refreshes your recollection as to the payment that was reported in the teletype messages, and if they don't total \$144,698?

A. The total of this tape is \$144,698.

Q. You can account for sixty of it?

A. Yes.

Q. Or about half—

A. Yes, I would say that is right.

Q. So that as of that date, then, assuming these premium collections you had received had all been American Fidelity collections, you had been paid,

(Testimony of Mark M. Hart.)

then, all the money Lotz had outstanding on his books belonging to you?

A. Not necessarily.

Q. Well, on your own figures you said he had \$140,000 coming, and we have just now collected and paid you one hundred forty-four.

A. Mr. Garrison, I can indicate what I mean if you will pick up that tape again, sir.

Q. Certainly.

A. I mean, you have an item on there, for example, of [803] \$4,300. That \$4,300 was a commission credit from us.

Q. I could be very mistaken, but I take my information from the teletype—page 6, counsel—dated 8/30 to Mark Hart, “have you received deposit slip covering commission check in the amount of \$4,300—\$4,304, from Central Bank and dated 8/14”

A. That’s right. But that is not a reduction of his accounts receivable. That is our commission.

Q. Did you send him that check?

A. Yes. Your last exhibit which you just presented shows that.

Q. And he took your check and deposited it?

A. Yes, sir.

Q. So that to that extent it didn’t represent accounts receivable collections.

A. That one item, yes.

Q. Do you know of any other?

A. May I think about it for a second?

Q. Certainly.

(Testimony of Mark M. Hart.)

A. I think the others shown on your tape must be all pure collections.

Q. Certainly they are. Now, Mr. Hart, you know about the requirement of agents to have trustee accounts, do you not? A. Yes, sir.

Q. And you require your general agents to maintain your [804] premium funds in trustee accounts?

A. That depends upon the state. California, yes.

Q. You are familiar with Section 1730 of the Insurance Code which makes it a crime to use premium funds for purposes other than the payment of the account of the company for whom the business is written? A. I am.

Q. And it is perfectly proper, is it not, for one general agent to commingle the funds of several companies in his trustee account?

A. I don't think there is any restriction against it.

Q. No. The only restriction is that he not commingle his own funds with the company's funds?

A. Yes, sir.

Q. And you knew that in respect to any collections that Mr. Lotz made, or Mr. Smead made for him, of premium receipts for business written by Mid-States, that they were trustee funds and he held them as a trustee in his trustee account.

Mr. Bronson: What company are you referring to, Mr. Garrison?

Mr. Garrison: I said Mid-States Insurance Company.

Mr. Bronson: At what time?

(Testimony of Mark M. Hart.)

The Witness: A. I knew that when, Mr. Garrison?

Mr. Garrison: Q. You knew that from the first day you entered the state of California as an insurer, that the law [805] relating to agents that they received the premiums from their writings as a trust and had to keep them in a trustee account?

A. Yes, but I don't believe you asked the question that way. But yes, I did know it.

Q. Well, maybe the specific statute was adopted some time later than you came in, but you had known for a long time that in California, at least, that is the character, premium funds received——

A. (Interposing) No question about it.

Q. There isn't any point in quibbling about it.

A. No question about it.

Q. And you knew that receipts that Mr. Lotz received, money that Mr. Lotz received for business he wrote in Mid-States Insurance Company were so characterized as trust funds, didn't you?

A. I make a distinction, Mr. Garrison, between trust funds and the California Insurance Code that calls for the maintenance of a trustee account.

Q. Well, I will adopt your interpretation of California laws. It does say that if a fiduciary doesn't—that he must——

Mr. Bronson: The law is the best evidence of that, Your Honor.

Mr. Garrison: I am asking him what he knows about it. He says he knows about it, and that when

(Testimony of Mark M. Hart.)

an agent receives premiums, he receives them as trust, as a trustee fund. [806]

The Witness: A. That is the California Code, as I understand it.

Mr. Garrison: Q. That is a correct understanding, and that is what we are talking about is the California Code. A. Yes, sir.

Q. So that you knew in August and in September and October and November and December of 1951 that that was the fact respecting Mr. Lotz' premium income?

A. Certainly.

Q. What was Mid-States' was Mid-States' and what was yours was yours.

A. No, I don't—I still don't interpret the California Code as that.

Q. Well, let's see if we agree on this: that at least insofar as the California law is concerned, that Mr. Lotz received the premiums as a trustee?

Mr. Bronson: I object to that as a legal conclusion.

The Court: If he knows, he may answer.

Mr. Garrison: He said a minute ago that that was true.

Mr. Garrison: Q. Didn't you?

A. May I explain my interpretation?

Q. No, just answer my question.

The Court: Answer it and make any explanation you wish.

The Witness: Thank you.

(Testimony of Mark M. Hart.)

Mr. Garrison: Q. After you have answered the question. [807] A. Yes, I understand.

Q. Isn't it true that at that time you knew that the funds that Lotz received on account of Mid-States writings were trustee funds and belonged to Mid-States, and that the law required him to hold them and pay them only to Mid-States?

A. No, and I would like to explain.

Q. All right. Now you may explain.

A. My interpretation of the Code, and I could be incorrect, is that premium monies collected by insurance agents must be kept separate and apart from the general operating funds and kept in a trustee account. To that extent I am very familiar with it.

But I don't know that that connotes a trust relationship between the companies, between the individual companies, and the agent. I am not an attorney and I am not sure whether or not I am right. That's what I have been trying to say.

Q. I think that expresses your views clearly. I understand what you are saying.

Do you remember when your deposition was taken on October 16, 1952, at 48 Wall Street, New York?

A. Yes.

Q. You were under oath on that occasion?

A. Yes, sir.

Q. Calling your attention to page 54 of that deposition——

Mr. Garrison: I would like, if I may, Your Honor, to [808] show it to the witness.

(Testimony of Mark M. Hart.)

The Court: Certainly.

Mr. Garrison: Q. I would like to ask if you were asked these questions and gave these answers. Reading from the upper portion of the page:

“Question: I am speaking now of this particular block that was written sometime in September or October of 1951.

“Answer: If there was a block written in September or October we did not participate in any extent.

“Question: Would it be true, then, that your Company had no right to participate in any of the premiums paid in that insurance?

“Answer: Of course not.”

Were you asked those questions——

A. Yes.

Q. ——and gave those answers?

A. Yes, sir.

Mr. Garrison: I have lost a page reference here someplace. I will have to come back to that. I can't take up the Court's time looking for it.

Mr. Garrison: Q. Going back, now, to your Oakland trip, you say that you gave this contract that you drew up for Lotz to sign the morning you were leaving Oakland? A. Yes, sir.

Q. You handed that contract to Lotz, did you?

A. Yes, sir.

Q. After he signed it? A. Yes, sir. [809]

Q. And then you gave the envelope to Smead?

A. I didn't personally give it to Smead.

Q. Mr. Feller did? A. Yes, sir.

(Testimony of Mark M. Hart.)

Q. Why was that envelope sealed?

A. Well, it was sealed because it was an arrangement of compensation that we made with Mr. Smead, and since he was an employee of Lotz, we felt it was a rather delicate subject.

Q. You didn't want Mr. Lotz to know about it?

A. Of course, if Mr. Smead desired to tell him.

Q. Sealing wouldn't be necessary to maintain that secrecy, would it? It could have been folded over?

A. Oh, I guess so, sure.

Q. Why wasn't that subject discussed with Mr. Lotz or Mr. Smead prior to that time?

A. It was discussed with Mr. Smead. It wasn't discussed with Mr. Lotz for the same reason I have just given.

Q. I thought you testified yesterday that you didn't discuss it with Mr. Smead?

A. Well, we asked—we told Mr. Smead the night before at the Leamington Hotel that we had decided that rather than put someone else in there to supervise our affairs, we would like to appoint him, and he agreed to it.

Q. Didn't you testify yesterday you didn't discuss it with Mr. Smead? [810]

A. That's the payment of the \$1,000.

Q. Yes. A. I didn't say that, no.

Q. You didn't say that? A. No.

Q. Thereafter, this appointment that you made in this contract, you looked to Mr. Smead, did you not, for the handling of your affairs in Lotz' office?

(Testimony of Mark M. Hart.)

A. Yes, sir.

Q. You gave him supreme authority?

A. Yes, sir.

Q. Over your affairs? A. Yes, sir.

Q. And he was to get that \$1,000 only in the event you got your account paid by September 15th, wasn't that right? A. That is correct.

Q. And you knew when you made that arrangement it wasn't physically possible for them to do it?

A. We thought it was psychological.

Q. I didn't ask you that. You knew it wasn't physically possible for them to pay you \$140,000 in the next 25 days?

A. We felt that it wasn't possible, that is correct.

Q. So that was the deal, the offer to Smead psychological also?

A. No, we intended to pay him irrespective of when it was [811] collected.

Q. Well, he was being paid by Mr. Lotz, wasn't he?

A. He was a salaried employee of Mr. Lotz, that's right.

Q. And it was his duty as such employee to pay accounts of all companies, wasn't it? That's what he was there for as general manager for him?

Mr. Bronson: That calls for his conclusion unless there is a foundation laid.

Mr. Garrison: Well, that's the normal duties of a general manager, to pay the accounts——

Mr. Bronson: I object——

(Testimony of Mark M. Hart.)

Mr. Garrison: If the Court please, Counsel is just interrupting me with discussion over here. If he has an objection I will yield and let him make it, but if he is going to just ramble on and get my mind distracted, I think the Court ought to require him to state his objection or not discuss it with me.

Mr. Bronson: I'm afraid you didn't hear me. I said it calls for a conclusion.

The Court: I will admonish you, we will proceed orderly.

Mr. Garrison: Now, whether you knew what Mr. Smead's functions were or not, he was paid by Mr. Lotz, you knew that? A. Yes, sir.

Q. And it is the duty of every general manager to pay all of their accounts as they come due, if they can, out of the [812] funds? A. Yes.

Q. Well, why did you think it was necessary to pay him a thousand dollars for work that he might have to perform between that date, which was August 22nd, and September 15th, or soon thereafter, whenever your account would be paid, which would be at the most a month or two? Didn't you think that was a rather substantial payment to a young man already on salary?

A. No. May I explain?

Q. Certainly.

A. Our first thought was to put somebody in there, and we thought of an accounting firm here in San Francisco, and that would have cost us a fee that was much more substantial than the \$1,000 we offered to pay Mr. Smead.

(Testimony of Mark M. Hart.)

Coming back to your question, the reason that we felt that it was necessary to have Mr. Smead do this is that we didn't think Mr. Lotz was competent to manage his financial affairs, and we wanted to limit him to certain drawings for his own expenses and salary. We wanted Mr. Smead to see that that was adhered to.

Q. Have you quite finished? A. Yes, sir.

Q. So it was your opinion a thousand dollars in additional compensation to Mr. Smead was reasonable, contemplating you [813] pay out in the next twenty-five or thirty or forty days?

A. Well, we knew it would take longer than that.

Q. I believe you testified that sometime in September, Mr. Smead contacted you and said that the Mid-States had an account due of \$27,000?

A. \$29,000.

Q. Twenty-nine thousand? And asked if he should pay it? A. That's right.

Q. Why was it necessary that Mr. Smead ask you if he, as a licensed insurance agent, should pay the account of another insurance company?

A. I can't answer for Mr. Smead's motives. It wasn't necessary for him to ask us.

Q. Nothing in the arrangement that you had made with him that you can explain might have prompted him to do that? A. No, sir, nothing.

Q. I believe you said that you didn't tell Mr. Smead to destroy teletypes that might be harmful to you? A. I said I didn't.

Q. Did not? A. That's right.

(Testimony of Mark M. Hart.)

Q. And there isn't any doubt in your mind about the fact that you didn't tell him? A. No.

Q. Well that brings us down, in any case, to about September [814] the 17th insofar as these payments on your account are concerned, and I figured up you had been paid \$144,000, and you called my attention to \$8,000 that was a commission. A. \$4,000.

Q. So that that leaves us undisputed a payment to you within twenty-five or twenty-seven days of \$140,000 of collections by the Lotz Agency, doesn't it? A. That's correct.

Q. So that you were somewhat mistaken, were you not, in the ability of Mr. Smead and Mr. Lotz to collect by September 15th, or were you talking in your contract about their collecting the whole \$240,000?

A. The liquidation of the \$240,000. There wasn't \$240,000 to collect, Mr. Garrison.

Q. No. Some of it you were going to take care of by crediting his account with earned commissions? A. Yes, and many other ways.

Q. And that could have been accomplished by the stroke of a pen, couldn't it? Wouldn't take any work or any part on Mr. Smead's part to do that?

A. No. No work at all.

Q. So that everything that Mr. Smead and Mr. Lotz could do under your contract and direction was accomplished by September 17th, wasn't it? All collections had been made of \$140,000? [815]

A. Not everything Mr. Smead could do, no, sir.

(Testimony of Mark M. Hart.)

Q. Well, everything that could be done in respect to collecting your premiums had been done, hadn't it? A. Yes.

Q. By September 17th? A. Yes, sir.

Q. That is, assuming that you had \$140,000 coming? A. If that is correct.

Q. If we take your figures? A. Yes.

Q. If we take the figures that the auditor found to be due, they had collected one-hundred per cent more than you had coming for your account?

A. If we take that figure.

Q. But at any rate, we now have as of this date, September 17th, assured your accounts receivable in the Lotz office? A. Apparently.

Q. Well, whose premiums did you think you were going to get after that date when they made collections and sent them to you? A. Nobody's.

Q. You knew they made collections after that date and sent them to you, credited them into your account in the Central Bank, didn't you?

A. I'm not sure whether it was premiums or commissions. [816]

Q. Well, let's see if we can make you sure. On September 21 you teletyped to Mr. Smead as follows—Page 11:

"Mark Hart to Ralph S. Smead. Sorry for error in my figure. Actual balance today is \$105,000. American Plan Loan of \$50,000 reduced to \$39,000 by application of July and August commissions.

"Balance, therefore, of \$66,955. But we would also like you to clear up amount due this organization

(Testimony of Mark M. Hart.)

of \$39,000. What is your specific reply to my urgent request for liquidation before company auditors arrive and preferably within the next five days."

Now, where did you think they were going to get premium income to pay you this additional \$66,000 if they had already exhausted your accounts receivable?

A. I wasn't talking about premium income. They were still talking about a \$50,000 loan. And they were entitled—We understood they were writing approximately \$100,000 a month for Mid-States on which they were entitled to deduct fifteen percent commission, or fifteen thousand dollars.

Q. Well, you knew that the loan thing was a miss and not in the realm of reasonable possibility?

A. No, I didn't. Later than that date Mr. Smead told me it was approved. [817]

Q. But you know that the likelihood of making such a loan—you tested it out yourself when you were in Oakland in August?

Mr. Bronson: That is an argument.

Mr. Garrison: Q. Didn't you know, as a matter of fact, that likelihood of a loan was exceedingly remote?

A. No, sir, I didn't know it was exceedingly remote.

Q. Well, you know they were never able to make it?

A. I was told by Mr. Smead that they had one consummated.

Q. But they never made one, did they?

(Testimony of Mark M. Hart.)

A. To my knowledge, no.

Q. Certainly not. Now, Mr. Smead, or Mr. Lotz, rather, or both of them said, in reply to you on the same day:

“To Mark Hart from Joe Lotz and Ralph Smead: In reply to your teletype of this morning, will have approximate deposit Monday of \$30,000. Working on loan for new balance.”

Where did you think that the \$30,000 was coming from?

A. Mr. Garrison, Mr. Lotz had told us, for one thing, that he had \$9,000 a month approximately in commissions coming from Mid-States under their old retrospective plan. He had a fifteen percent pre-paid commission with Mid-States which would bring him a substantial income. He had income from other companies, from life insurance and so forth and so on.

Q. Well, how did you think he was going to pay his overhead? He had paid you every penny he could collect for the last four [818] months, \$140,000?

A. No, not quite. We left some money in his trustee account, if you notice.

Q. Well, then on the 26th of September, he says: “Would you advise Mr. Hart we deposited \$15,000 to A.F.C. account? End.”

And the message comes back:

“What about previous Sixteen Thousand that you told Mr. Hart about? Deposit figure should be fifteen thousand, and that is from the sixteen thou-

(Testimony of Mark M. Hart.)

sand figure. We still have some money in our trust account, fifteen thousand over and above the fifteen previously mentioned above. No, it is not. That is the deposit. Statements have been mailed."

Did you have any idea where they were getting that money?

A. My conclusion was that——

Mr. Bronson: Wait a minute. You left out a word. "Statements were mailed yesterday. Commissions." Am I correct in that?

Mr. Garrison: Yes, "Commissions."

Mr. Garrison. Q. Well, he didn't have \$16,000 in commissions coming from you?

A. Not from us, no.

Q. All right, going to the 27th. To Mr. Hart from Smead, [819] apparently:

"Can't get phone circuit to your office. It will not be necessary for you to call Smead in Santa Monica. Funds of his are being mailed to us today. We are making drive to see how much balance can be reduced by the first. Joe is working on loan now. Should have some info today. Do you have any further instructions? Ralph Smead.

"Go ahead. Will teletype you tomorrow to get up to date story as frankly am deeply concerned about the attitude assumed by Company if their auditors uncover the delinquency. Relying on you to do your utmost and to keep me posted everyday by teletype."

Where did you think they were going to get funds

(Testimony of Mark M. Hart.)

to pay your account except from premium income of other companies?

A. I thought that they were going to get funds from this loan that they were talking about—(A). and (B) from commissions earned under their writings for Mid-States, which we understood were substantial.

Q. On the 27th your operator teletyped to Mr. Smead and Mark Hart:

“This is our last working day of the month. Must have some definite and positive information your intentions or will be advised to take drastic [S20] steps immediately. Hope this will be unnecessary. What is the score? Go ahead.”

Then it says:

“Mr. Smead is out.”

“American Plan Operator:

“I think this is a stall. Unless I hear from Mr. Smead before tomorrow morning will take necessary action including advice to Insurance Department and other local authorities unless you can find Mr. Smead.”

You expected \$105,000 balance would be paid, then, in this period out of his commissions from other companies?

A. Not entirely, no, sir.

Q. What other source did you think he would use?

A. He was still working on the loan. He was still assuring us he had a loan coming through. And we still had \$60,000 of commissions due him, approxi-

(Testimony of Mark M. Hart.)

mately. Somewheres between fifty-three and sixty, I should say.

Q. He didn't have to collect those commissions. Those commissions were on your books to his credit, weren't they? A. As they earned.

Q. As they earned. That had nothing to do with your pressing him to go out and raise money? That was on your books to his credit as they were earned?

A. As they were earned. [821]

Q. That had nothing to do with this business we are talking about, did it?

A. But I thought you said, how did you expect to liquidate your balance.

Q. By collections, I mean.

A. By collections from commissions and loan.

Q. Certainly.

The Court: Recess to two o'clock.

(Whereupon this cause was recessed to the hour of 2:00 o'clock p.m. this date.) [822]

MARK M. HART

a witness called on behalf of the defendant herein, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Mr. Garrison: Q. Mr. Hart, what were you going to report to the Insurance Commissioner and other officials in September of 1951 when you tele-

(Testimony of Mark M. Hart.)

typed Mr. Lotz you were going to make that report unless you could find Mr. Smead?

A. I suppose I was going to report to the Insurance Commissioner the fact that the Lotz Agency was delinquent in their balance to us.

Q. Delinquency in and of itself wouldn't be a matter of particular concern to the Department, would it?

A. If it was caused by violation of the trustee account, it would be.

Q. What were you going to report to the other local authorities?

A. What other local authorities?

Q. I don't know. You used the expression.

A. Would you refresh my memory?

Q. Surely (handing document to the witness).

Mr. Garrison: Top of the page.

The Witness: At this moment I can't say, other than——

Mr. Garrison: Q. Is that more psychological?

A. Possibly a collection device.

Q. As I understood you before luncheon, you said that you assumed that Lotz and Smead were getting their funds from earned commissions, advance commissions from Mid-States?

A. In part, yes.

Q. And you knew, didn't you, that the arrangement that Lotz made with Mid-States for any advance commissions wasn't made until September—the September contract?

A. I believe it was September 1st, yes.

(Testimony of Mark M. Hart.)

Q. Yes. And that he wouldn't receive any of those advance commissions until he had written business, after September 1st?

A. That is correct. [824]

Q. And had collected the premiums?

A. That is correct.

Q. And he would only receive it to the extent that he did collect premiums?

A. That's right.

Q. And he only got fifteen per cent advance commission? A. Yes, sir.

Q. So that if he wrote as much as a hundred thousand dollars in the month of September, and if he collected all of his premiums in the month of September, he would only have been entitled to \$15,000 under that arrangement, wouldn't he?

A. That is correct.

Q. Well, we find ourselves down now to the point in your relationship with Mr. Lotz when you had a balance due of sixty-seven thousand odd dollars. I believe that was in October?

A. I think that is right.

Q. Sixty-one after you deducted the \$5,000 expenses.

A. What expenses, Mr. Garrison?

Q. Well, didn't you deduct some expenses to arrive at a round figure of \$61,000 balance due from Lotz?

A. That would tend to increase the balance. You mean expenses charged against Mr. Lotz?

Q. Yes.

(Testimony of Mark M. Hart.)

A. That would tend to increase the balance.[825]

Q. Well, you did arrive at a \$61,000—\$71,000 figure, didn't you? A. Yes, sir.

Q. I guess it was sixty-one before and then you added expenses? A. That is correct.

Q. Made it seventy-one.

A. But that was October 31st.

Q. I said October. By the way, I asked you earlier if it weren't a fact that Mr. Cass, who arranged the contract between your company and Lotz, didn't work for you at the time that contract was entered into between you, and you said no, he didn't work for you. The fact is, he was your agent at that time, wasn't he?

A. Mr. Cass was a free lance special representative consummating agency agreements between our company and various agents, or for any other company.

Q. Well, all right. I said he was employed by you. A. Employed, you said.

Q. I beg your pardon.

A. I believe you asked if he were employed by us.

Q. Yes, and you said no. A. That's right.

Q. Now, you say he was a special agent on a free lance basis appointing agents. [826]

A. That is right. Working on a commission basis.

Q. For compensation?

Mr. Bronson: Wait a minute.

Mr. Garrison: Q. Go ahead.

(Testimony of Mark M. Hart.)

A. There are several specialists around the——

Mr. Garrison: Q. I am not interested in several specialists. I am talking about Mr. Cass.

A. All right. Mr. Cass was an automobile finance specialist.

Q. He appointed agents for you? A. Yes.

Q. And received some compensation for it?

A. Yes.

Q. He did arrange the Lotz appointment with your company, didn't he? A. Yes, sir.

Q. And at the time he knew considerably about Mr. Lotz and Mr. Lotz' affairs, when he made the appointment? A. I imagine so.

Q. That is what I had reference to this morning. So that you did have some conversations with Mr. Hatfield about the \$61,000 balance that was still owing to you by Mr. Lotz and the proposal of rewriting that business, taking it out of your company and putting it on the books of the Mid-States Insurance company? A. Yes, sir. [827]

Q. And you had conversations about that with Mr. Smead and Mr. Lotz?

A. I am not sure with Mr. Lotz, but definitely with Mr. Smead.

Q. So, as I understand it, you had that much business on your books and it was all in arrears.

A. As of what date, sir?

Q. As of the date we are talking about, October 31st.

A. No, I can't say it was all in arrears.

Q. Well, was it or wasn't it. A. Partially.

(Testimony of Mark M. Hart.)

Q. Referring again to your deposition, and commencing on page 63, at the bottom of the page, I will ask you if these questions were asked and if you gave these answers:

“Question: But there was some of it, though, that had been written beyond the credit period of Lotz with your company, wasn’t there?”

“Answer: It might have been.

“Question: So there would have been some that he would have been in arrears of at the time it was transferred over?”

“Answer: All of it was in arrears. He just told us he did not have the \$60,000 to pay us. But he had arranged with Hatfield to rewrite.”

Did you give that testimony? A. I did.

Q. Does that refresh your recollection?

A. It does, but that is inaccurate.

Q. At least some of it was in arrears?

A. Yes, sir, partially in arrears.

Q. I believe you called Mr. Hatfield on October 31st?

A. That is correct.

Q. And you had a conversation that you went to the pains of recording?

A. That’s correct.

Q. Did you tell Mr. Hatfield in that conversation about this collection technique you had employed with Mr. Lotz?

A. Not at all.

Q. Did you tell him that Lotz had taken over \$150,000 of Public Service business?

A. No.

Q. Did you tell him Lotz was broke?

A. No.

Q. Did you tell him that you had cancelled Lotz’ contract?

A. No.

(Testimony of Mark M. Hart.)

Q. As a matter of fact, you told him that you hadn't cancelled his contract, didn't you?

A. I don't recall that.

Q. I will show you the transcript of the telephone conversation——

Mr. Garrison: Does Your Honor have an interruption? [829]

(Short interruption.)

Mr. Garrison: Will you read the last question?
Mr. Reporter?

(Whereupon question was ready by the Reporter.)

Mr. Garrison: Q. I read you your statement to Mr. Hatfield to refresh your recollection of the conversation:

"Hatfield: You didn't kick them out, I know that."

A. Excuse me, counsel, I haven't reached it.

Q. Page 7, last line. A. Yes.

Q. (Reading)

"Hatfield: You didn't kick them out, I know that.

"Hart: No. We want to get through. No, we didn't kick them out, of course not."

That is what you told Mr. Hatfield, is it not?

A. That's right.

Q. As a matter of fact, his contract has been cancelled as of August 20th, isn't that right?

A. That's right, but we didn't kick him out.

Q. You make a distinction? A. Oh, yes.

Q. You didn't kick him out?

(Testimony of Mark M. Hart.)

A. That's right. [830]

Q. Your statement to Mr. Hatfield is a fair statement, in your opinion, is it, about the relationship with you and Mr. Lotz at that time?

A. Yes, it is.

Q. All right. The fact of the matter is that you tore up all the policies that were in Mr. Lotz' office when you went out to Oakland, didn't you?

A. I certainly did.

Q. And isn't it true that in your meeting with him on August 13th in New York, whether or not you tentatively kicked out the contract, cancelled the contract, you actually suspended his writing powers by telling him not to write any more?

A. No, I didn't. He was still writing when we got there on the 20th.

Q. But you stopped him effectively as of August 22nd? A. Yes, sir.

Q. And he wrote no more business for American Fidelity and Casualty Company after August 22nd, did he?

A. With few exceptions. They had some policies going through the procedure.

Q. Excepting those that might have been in the machine? A. Yes.

Q. Everything else was torn up?

A. That's right.

Q. What did you tell Mr. Hatfield about that?

A. I didn't tell him anything about it.

Q. Reading from the telephone conversation, on page 2:

(Testimony of Mark M. Hart.)

“Hatfield: Yes. How old is it?”

“Hart: September.

“Hatfield: September?”

“Hart: September and there’s some August. But, you see, the September business is not due under our contract. We have 75 days.

“Hatfield: Sure.

“Hart: Actually until December 15th.

“Hatfield: Yes.”

Now, what business did you have written in September?

A. None whatsoever. That was an error that I realized after I read this.

Q. Well, that had a very, very great significance insofar as Mr. Hatfield’s accepting this business is concerned, whether any of it was written in September or August or prior? Wasn’t that the significant circumstance in that transaction?

Mr. Bronson: Wait a minute. Significant to Mr. Hatfield, you mean?

Mr. Garrison: It’s significant to Mr. Hart, too, counsel, and I think you will admit it.

Mr. Bronson: Let’s have the question.

Mr. Garrison: I withdraw the question. It is obviously significant. [832]

Mr. Bronson: Well, now——

Mr. Garrison: Q. Your testimony now is that it was an error that you made then?

Mr. Bronson: Your Honor, how does counsel on the opposite side contend with this situation? I don’t want to tread on anybody’s——

(Testimony of Mark M. Hart.)

The Court: (Interposing) I realize that you are helpless under certain circumstances.

Mr. Garrison: I have never seen Mr. Bronson helpless, Your Honor, up to now, and I don't think he is helpless now.

The Court: What I might suggest is that your questions are rather argumentative.

Mr. Garrison: Well, I don't want them to be and I will try not to have them.

The Court: All right. [833]

Mr. Garrison: Q. As I understand your testimony now, that was a mistake you made and you discovered it later when you read the transcript.

A. When I either read it or listened to the record, yes.

Q. You didn't tell us anything about this mistake when we took your deposition in New York, did you? A. I don't think it came up.

Q. We talked about the telephone conversation.

Mr. Bronson: I will ask that the record be produced, Your Honor, in lieu of this guessing.

Mr. Garrison: Q. You remember our asking you about the telephone conversation in your deposition? A. Yes.

Q. And you didn't tell us you made a mistake.

Mr. Bronson: I object to that. The record is lying right at his right hand and it is the best evidence of what was said in there.

Mr. Garrison: Well, there's nothing in there about it, and Mr. Hart knows it.

(Testimony of Mark M. Hart.)

The Witness: I don't think the question was asked.

Mr. Garrison: Q. You didn't feel it incumbent upon you to make any explanation at that time or since that time until today.

Mr. Bronson: Incompetent, irrelevant and immaterial, Your Honor. [834]

The Court: Ask him what was asked.

Mr. Garrison: I say, Your Honor, the present question is that he didn't feel it incumbent upon himself to make any explanation since that date until this date.

The Court: You may answer the question.

Mr. Bronson: Again I suggest the record—this is very unfair unless the record is read.

Mr. Garrison: But there's nothing in the record.

The Court: Counsel indicates there is nothing in the record.

Mr. Bronson: Then why go into it? He says why didn't he bust out with a voluntary statement about something that wasn't even inquired into.

The Court: In the interests of time I will allow him to answer the question. Go on. What is your answer?

The Witness: A. I didn't volunteer that information. Frankly, it never occurred to me.

Mr. Garrison: Q. Very well. When did you first see the statements that Mr. Smead—the several statements that Mr. Smead and Mr. Lotz prepared, including the supplements that were made to them?

A. I can't exactly fix the date, but I don't be-

(Testimony of Mark M. Hart.)

lieve it was until the bank intervened in the so-called bank case. I am not certain of the date. I am not certain of the date.

Q. Well, didn't Mr. Titus tell you about them when you met [835] him in Chicago at that meeting?

A. He told me he had them.

Q. Didn't you thereafter inquire in Oakland regarding them? A. I don't believe so.

Q. At any rate, at some time you did see them and read them? A. Yes, sir.

Q. And you have since characterized them, at least in the most part, as being false?

Mr. Bronson: What? May it please the Court, the testimony stands for itself, whether it is for the most part, least part, or what.

Mr. Garrison: Well, this is cross-examination. I don't see how I can get about the subject without asking that question.

The Court: I will ask you to listen to the reporter on that question. Mr. Reporter, will you read that question?

(Question read.)

The Court: Characterized what?

Mr. Garrison: Statements that Mr. Smead and Mr. Lotz wrote out on December 6th and thereafter. Mr. Hart testified on direct examination that they were false in most particulars.

The Court: You may answer.

Mr. Garrison: He didn't touch on every word, but——

Mr. Bronson: I spent an hour, or half a day,

(Testimony of Mark M. Hart.)

rather, yesterday bringing out with each of the several statements—I believe there are four of them—those parts in which this [836] witness says they are false and the parts in which he thinks they are true. Your Honor heard that at great length and this adds nothing at all. It is already thoroughly covered.

Mr. Garrison: It was covered by him, but it hasn't been covered by me. I don't propose to go into the details of the statements. I just asked him if he didn't in his direct testimony go through the statements and answer, at least substantially, that the statements therein were false.

The Witness: A. The answer is yes.

Q. Yes. Of course you did. There is no argument about it. You took Mr. Smead's and Mr. Lotz' statement that I prepared in my office and went right down the line with Mr. McKinnon and on all material points said the statements were false? That is true?

A. I don't know about all material points.

Q. Well, substantially all.

A. Substantially, I said they were not true.

Q. Did you do the same thing with respect to Mr. Smead's statement dated December 6, the ten-page statement?

A. If Mr. Bronson's questions directed to me came from that, yes.

Q. And it is your present testimony, then, that insofar as the statements in this statement coincide

(Testimony of Mark M. Hart.)

with the ones that Mr. Bronson asked about, they are false? A. Substantially. [837]

Q. That is what I mean, of course. And you know and you knew when you first saw them and Mr. Smead and Mr. Lotz had had their signatures acknowledged before a notary? A. I saw that.

Q. You knew that when they were signed by each of those gentlemen, that they were signed in the presence of their lawyer? A. I heard that.

Q. And yet you believe that Mr. Smead had deliberately told untruths in that statement?

A. I know he did.

Q. Did you know it then?

A. When, Mr. Garrison?

Q. When you first saw them. A. Oh, yes.

Q. When you first read them. Well, why would you hire a man like that in January of 1952?

A. I think I explained that yesterday.

Q. Explain it again.

A. I will. The cancelled policies returned by assureds and sub-agents, the loss reports and other loss data, were piling up in the office—the former office of Joseph Lotz, which I understood was under the custody of Mid-States, and as a result we had a terrific backlog of work to perform.

We had many, many complaints from assureds and sub-agents, [838] and in the interests of serving the public, the insuring public, it became very vital for us to dispose of these cancellations and losses.

The only man that knew what it was all about, and the only man we could turn to in this emerg-

(Testimony of Mark M. Hart.)

ency was Ralph Smead, and that's why I hired him.

Q. And that's the only reason?

A. Why, yes.

Q. Then why, six months later, did you promote him to Pacific Coast manager for your company?

A. I didn't promote him, actually. Actually, it was an entirely new job, entirely apart from his first capacity for which he acted for us—under which he acted for us—and Mr. Smead had discharged his duties with respect to the first assignment extremely well and asked for a chance to produce business for us.

Q. Well, at any rate you did employ him as your Pacific Coast branch manager?

A. For a while, yes.

Q. And you employed him in that capacity until the bank case was over, didn't you?

A. When was the bank case?

Q. The bank case was over in May, 1952—1953, I should say.

A. Well, then, if we terminated his employment in October, 1953, we did employ him until after the bank case. [839]

Q. That's right. We have heard reference to a \$50,000 loan. That transaction, as I understand it, was simply a credit on your books of Mr. Lotz' account with you.

A. Yes, but that was adjusted to thirty eight or thirty nine thousand.

Q. Thirty eight or thirty nine thousand?

A. That's right.

(Testimony of Mark M. Hart.)

Q. It turned out not to be fifty, but thirty eight or thirty nine? A. That is right.

Q. And the effect of that transaction, or that contract on his account, was to permit you and others in your company to be in a position to be able to say to anyone who inquired that Mr. Lotz' affairs with you were current?

A. That is not correct. That was not the intent.

Q. I didn't ask you about the intent, I asked you about the effect of it.

A. I am sorry, that was not the effect of that.

Q. It did permit you to say the account was current, didn't it?

A. I suppose that incidentally it did.

Q. Not incidentally. It did permit you to say to anyone if they were to inquire the account with Mr. Lotz was current. A. Yes, it did.

Q. Yes, it did, of course. And wasn't the purpose of that so [840] that if Mid-States should call you you would be able to give them that information and allay their suspicion that maybe Lotz was in financial difficulties.

A. No, that is not correct.

Q. Well, in any event, you gave specific instructions to your associates in the company to the effect that they were to so advise anybody who so inquired? A. Yes, I did.

Q. Reading from page 3 of Plaintiff's Exhibit 35, dated August 29, the letter reads:—this is a letter from you to Mr. Will.

“In closing, you are instructed to inform anyone

(Testimony of Mark M. Hart.)

who inquires that Joe Lotz is up to date in his accounts with us and is not delinquent. This is not only extremely important, but it is actually true as Joe Lotz' May balance is technically paid and his June balance is not due until September 15th, 1951."

Why was that so extremely important?

A. May I explain?

Q. Certainly you may.

A. Mr. Garrison, the insurance business is a goldfish bowl in that everybody inquires of other companies the status of agents. Mr. Lotz represented, in addition to Mid-States, life insurance companies and other insurance companies, and it was [841] within the realm of possibility that he would apply to other companies for representation.

I was interested in keeping Mr. Lotz in business to collect our money. And, among other things, I felt very sorry for Joe Lotz, who I have always considered to be extremely honest, and for that reason I wanted to be certain that our treasurer told the truth, namely, that he was not delinquent and not in any way besmirch him or spoil his chances with any other company he may represent.

Q. That was written on August 29, 1951?

A. That's correct.

Q. Right after you had come out to Oakland and had developed this tremendous concern about his financial affairs?

A. That was written after I came out to Oakland.

(Testimony of Mark M. Hart.)

Q. When you knew that he was in extremely bad financial condition?

A. I knew he wasn't liquid.

Q. Well, you knew that he had—that he was trying frantically to borrow money from the bank.

A. I knew that he was trying to borrow money.

Q. And you knew that he had been in default in his contract with you and was in arrears and would still be in arrears if you hadn't made this entry on your books to bring him current, didn't you?

A. Yes, but that was not the purpose of the entry on the books. [842]

Q. No. But the effect of it was to permit your people to say that he was current, and that is only half the truth, isn't it, Mr. Hart?

A. No, not the way you use the word, Mr. Garrison. You are saying, "effect", instead of "intent". If you ask me what the intent was, I will tell you.

Q. You told us. You alluded yesterday to the Public—the poor Public, I think Mr. Bronson said—in respect to the affairs of the Mid-States Insurance Company in California. Do you know of a single instance where any assured did not get paid for its loss? A. Talking about us?

Q. By Mid-States Insurance Company.

A. No, I have no knowledge of Mid-States.

Q. Do you know of a single instance where an assured didn't get a refund of premium he had coming by Mid-States Insurance Company?

A. No. But that wasn't the allusion.

(Testimony of Mark M. Hart.)

Mr. Bronson: What was the answer?

A. The answer is no, but we didn't allude to Mid-States. We were talking about our own policies.

Mr. Garrison: That is all.

Cross Examination

Mr. McCallum: Q. Mr. Hart, do you recall that in one of [843] these teletype messages there is a reference made to a conversation or telephone call you made to our bank shortly after you were out in Oakland in August?

A. Yes, I have seen those.

Q. That would have been very shortly after you went to the Central Bank, is that correct?

A. Not very shortly. We went to the Central Bank, I think, in April or May.

Q. I am sorry, I didn't make my point clear. You went to the Central Bank around August 22nd, didn't you?

A. Oh, yes.

Q. And at that time an agreement was entered into which has been introduced here, the substance of which you appointed Mr. Smead your exclusive agent for your financial affairs.

A. That is correct.

Q. And that has been marked Plaintiff's Exhibit 17. You recall that?

A. Yes.

Q. And you gave a copy of this document to the Central Bank?

A. Yes.

Q. Now, isn't it true that shortly after you gave the bank a copy of that agreement, and after your

(Testimony of Mark M. Hart.)

visit to the bank that day, some problems developed with the Central Bank and Mr. Lotz?

A. I don't recall any such problems.

Q. Didn't something occur that the Central Bank was having a [844] difficult time in accepting the program you had outlined for Mr. Lotz and Mr. Smead to follow?

A. The Central Bank wasn't part of that program.

Q. No, but didn't they raise some objection to it?

A. No.

Q. Did any question arise as to the deposit of funds in that bank by Mr. Lotz or Mr. Smead after your visit there on August 22nd?

A. Not to my knowledge.

Q. What was the purpose, then, that you called at the Central Bank?

A. I don't know. I have been mystified since I looked at those teletypes. I can't recall why.

Q. Did you make very many telephone calls to the Central Bank?

A. No, not telephone calls. We had quite a few wires in relation to the balance in our account.

Q. But you do recall speaking to someone in the Central Bank about Mr. Lotz' affairs shortly after you had signed the contract with Mr. Smead and Mr. Lotz?

A. I don't definitely recall that it was in relationship to Mr. Lotz' affairs, no, other than as a part of our banking arrangements on this automatic transfer of funds we were talking about.

(Testimony of Mark M. Hart.)

Q. Well, when the teletype says, "Things are now a little better with the Central Bank", after your call to them, do you [845] know what that has reference to?

A. No, I can't say definitely. I have an idea what it might be.

Q. But you don't know?

A. I don't know.

Q. Mr. Hart, when deposits were made in the American Fidelity account you were sent a copy of the deposit slip, weren't you? A. Yes.

Q. Did the Central Bank also send you a copy of the deposit slip?

A. I think we only received one copy of the deposit slips.

Q. Did that come from Mr. Smead or Mr. Lotz, or did it come from the bank?

A. I think it came from Mr. Smead.

Q. I see. And those deposit slips were sent to you regularly after your visit out here in August?

A. Yes.

Q. And those are the deposit slips referred to in the teletype messages? A. Yes.

Q. Now, on each one of those deposit slips there appears the branch or bank number referring to the check that was deposited at that particular time, didn't it? A. I don't know.

Q. Did you never see the deposit slips? [846]

A. Oh, yes, I saw every deposit slip.

Q. Then you know on the deposit slip the amount of the check was entered, wasn't it.

(Testimony of Mark M. Hart.)

A. Yes.

Q. And also opposite the amount of a check would be entered the bank number?

A. If it was, I never noticed it.

Q. Now, you have heard Mr. Lotz testify that he told the Anglo Bank he had power to endorse checks made payable to Mid-States, haven't you?

A. Yes.

Q. And you have heard Mr. Smead so testify that on several occasions he told the Anglo Bank Mr. Lotz had authority to endorse checks made payable to Mid-States? A. I heard that.

Q. Now, at the time Mr. Smead was telling the Anglo Bank that Mr. Lotz had authority to endorse checks, he was your agent, wasn't he, acting under this agreement of August 22nd?

A. Did you say Mr. Smead was our agent?

Q. Yes, sir. A. Yes.

Mr. McKinnon: Pardon me. May it be stipulated, if the Court please, that the objection previously made by us to this type of testimony elicited by Mr. McCallum is subject to motion to strike on the ground it is incompetent, irrelevant and [847] immaterial?

The Court: Let the record so show.

Mr. McCallum: Q. I believe the answer to the last question was that at that time Mr. Smead was acting as your agent? A. Yes.

Mr. McCallum: I think that is all, Your Honor.

(Testimony of Mark M. Hart.)

Redirect Examination

Mr. Bronson: I would like to have Exhibit 35.

Q. Regarding this letter, excerpts of which have been wrenched from the original, if I can be forgiven the expression, and read to you by Mr. Garrison—I am referring to the letter of August 29th addressed to H. A. Will by you. Now, that is a confidential, inter-office communication between two officers, namely, the president and the treasurer?

A. Yes, sir.

Q. And its original was delivered to Mr. Garrison under an order of court requiring the production of certain records from your files, is that true?

A. Yes.

Q. Now, so that the Court may understand the context of these parts read by Mr. Garrison, I am going to entrench on your Honor's patience by reading the entire letter. It is addressed to Mr. H. A. Will, dated August 29, 1951, from Mark M. Hart.

(Thereupon, Plaintiff's Exhibit 35 was read to [848] the Court by Mr. Bronson.)

Mr. Bronson: Q. Now, you have described the nature of this correspondence with your treasurer of your company, and in reading that, is there any reference to attacking or invading premium funds of any other company, by direct reference or implication of language in your particular business?

A. No, sir.

Q. And that confidential instruction was given

(Testimony of Mark M. Hart.)

to your treasurer on August 29, 1951, just a week after you left Oakland? A. Yes, sir.

Q. How, counsel read first the paragraph which I will take the liberty of reading again. It is very brief. Preliminary to a question in explanation of it, and if need *by* you can refer to any of the preceding or following.

“At the present writing there are premiums outstanding of \$70,000 due Joe Lotz from sub-agents and applicable to policies of the American Fidelity and Casualty. I have instructed Smead to either effect collection with a reasonable time or, failing to do so, cancel the individual policies for non-payment of premium. In any event, we are assured of an additional \$70,000 credit either by cancellation or collection.”

In the first place, a cancellation is a right that the insurer [849] has under the terms of a policy at any time without cause, is that true?

A. Yes, sir.

Q. He can cancel for non-payment of premium, is that true? A. Yes.

Q. If he cancels after payment of premium and the current period of the policy, he is required to make a pro-rata return of premium, is that correct?

A. That is correct.

Q. The seventy thousand referred to there, “present writing there are premiums outstanding of seventy thousand Joe Lotz”, is that in conflict with your testimony of the assurances and your

(Testimony of Mark M. Hart.)

belief that there was one hundred forty thousand outstanding at that time?

A. No, sir, it isn't.

Q. Will you explain that to the judge, if you please?

A. Yes. Between the visit at my office in New York on August 13th and when I arrived in Oakland on August 20th, Mr. Smead had deposited or sent us \$8,000.

While we were in Oakland, while we were at Mr. Lotz' office, we picked up \$24,000 from his trustee account, making a total of \$32,000.

We also deposited \$4300, that commission item that was referred to before, which is \$36,000. We were told by Mr. Smead that \$30,000 had been deposited, which would be \$62,000. [850]

Q. Were there any credits for commission accruing at that time to Joe Lotz from your business?

A. I think there were, but I don't think they would have any bearing.

Q. All right, don't let me disturb your explanation. Go ahead.

A. And that sum total added to the seventy thousand which as of that date, August 29th, when I said approximately \$70,000 of unpaid premiums, approximately make the \$140,000 that we were told about on August 13th and again on August 20th.

Q. All right.

A. In other words, that is a net figure after taking into consideration the items I have just mentioned.

(Testimony of Mark M. Hart.)

Q. Now, you were questioned by Mr. Garrison about the conflict in your statement that Mr. Smead told you that there was \$140,000 of receivables when he was in New York—he and Mr. Lotz were in New York—and Mr. Smead's statement in this courtroom that there was seventy or seventy five thousand only there.

You made a comment in answer to one of Mr. Garrison's questions on that subject that there was one hundred forty thousand of resources, as you had every reason to believe. Will you explain what your reasons were for believing that?

A. Yes. May I refer to a wire from my office? I wired my office asking them to give me the exact figures. [851]

On August 13th when Mr. Lotz and Mr. Smead visited our office in New York only one day had elapsed since we mailed out our July account current.

The gross premiums—and this is before giving effect to return premiums—the gross premiums alone for the month of July, which I assumed were not collected as of August 13th, were \$88,704. The gross premiums applicable to June——

I am sorry, may I go back? Gross premiums applicable to August which at that time—this is August 13th—alone were \$45,000. That forty five and eighty eight made \$133,000 before taking into consideration sub-agents' commissions, which would naturally be deducted from the receivables.

The June account showed gross premiums of

(Testimony of Mark M. Hart.)

\$58,000, and since we were told that there were \$40,000 unpaid on the May premiums of \$66,000, which gross was \$71,000, it was reasonable to assume that June business was not collected.

So that totals \$191,000. Taking into consideration even a 30 per cent sub-agents' commission leaves 70 per cent of \$191,000, is \$133,700, so that when I was informed there was roughly \$140,000 of receivables I accepted it as a reasonable amount.

Q. Did you have those figures available to you at the time of the meeting? You certainly had the June, July and August?

A. I didn't have August, no, sir.

Q. But you had an estimate from Mr. Smead of what his August [852] business was running as far as American Fidelity?

A. I don't think Mr. Smead orally gave me the estimate until August 20, but I estimated the August net premiums as \$40,000 since it was just the middle of August and July had been \$80,000 in net premiums, and I worked it on that basis.

Q. And you were allowing, in reaching the figure of \$133,700, which would have to stand in place of the \$140,000, you were allowing a full 30 per cent commission on every dollar of business you wrote?

A. That's right. I was allowing the maximum.

Q. Now, as a matter of experience, do you know whether he was paying as high as 30 per cent on every dollar of business he turned over?

A. No. I learned that he was paying as high as 30 per cent, but not on every dollar.

(Testimony of Mark M. Hart.)

Q. Now, this 15 per cent prepaid commission arrangement that you refer to as the arrangement that Mid-States made for Joe Lotz some time effective around September 1st, that 15 per cent prepaid, is that on the gross premium or net premium?

A. That's on gross written premiums less gross returned premiums.

Q. Yes. But it isn't on net after taking off commissions to sub-agents, and so on?

A. No, sir.

Q. Now, I want to allude to this matter of the \$1,000 that you [853] offered to pay to Mr. Smead by a letter which you handed to him, or Mr. Feller handed to him—sealed envelope. I don't want to go anything but one aspect of it:

If on the date that you decided to cancel Lotz' agency for American Plan and to set up a course of liquidation of the account, what additional work would have to be done by any individual who, as you said, was the only person you could turn to—. Well, that was later.

But, in any event, if you put Mr. Smead there to do that, what additional labor, just briefly, would be passed upon him under that scheme, under that arrangement whereby a liquidation process was set up for the balances due to the company that had cancelled the agency arrangement?

A. Well—

Mr. Garrison: (Interposing): If the Court please, I think counsel went into that on his direct examination, and this man went into a lot of night

(Testimony of Mark M. Hart.)

work, Saturdays and Sundays, and I think it has been covered on the direct examination. I object to this as not proper redirect examination.

The Court: That may be, but, however, you can go into it briefly. I think it has been gone into.

Mr. Bronson: I asked him to go into it briefly, and it hasn't been touched on, and counsel attacked the witness on that, and that's why I asked him.

Mr. Garrison: Why, I certainly do attack him, but he has [854] already been rehabilitated as much as he can.

Mr. Bronson: Well, the Judge is going to let me have an answer, if it is all right with you.

The Witness: A. Primarily, two functions: acceleration of collections, and, failing to collect, the physical work in connection with the cancellation of the policies.

Mr. Bronson: Q. All right, supposing he was putting in an eight hour day, or whatever the office hours were over there in his routine work for Joe Lotz, and he was expected to go out and accelerate payments from the sub-agents, either during office hours or after hours—well, would that be done in office hours or after office hours, normally?

A. I think some of it could be done in office hours, but normally most of it would have had to have been done after office hours.

Q. And how much area were these sub-agents scattered around the center point of the Lotz agency?

(Testimony of Mark M. Hart.)

A. It scattered quite widely and went down as far as Santa Monica, which was a big one.

Q. And how far up north?

A. I couldn't say. I don't know the geography around here.

Q. Now, the paper work of running through the cancellation of a policy is not a simple matter is it?

A. It is a time-consuming matter.

Q. Time-consuming matter? That's all. Oh, that is what you [855] proposed to pay him for, is that right, that kind of service?

A. That is it.

Mr. Bronson: That's all.

(Short recess.)

Recross Examination

Mr. Garrison: I have one or two questions, Your Honor.

Q. I believe you said you arrived at the \$140,000 figure in a meeting in New York on August 13th by making certain assumptions?

A. Yes, sir.

Q. Those assumptions were, as I understand it, that Mr. Lotz had not collected from his sub-agents in certain months' business.

A. That's correct.

Q. Mr. Smead told you initially that the amount of monies outstanding in sub-agents' accounts in your favor was \$75,000, I believe?

A. No, in New York he said \$140,000.

(Testimony of Mark M. Hart.)

Q. Didn't he originally say seventy five, and then you reviewed it with him, and——

A. That was in Oakland, Mr. Garrison.

Q. And you went over these—In Oakland he said it was seventy five? A. That's right.

Q. And you went over these accounts as you did with us, made [856] certain assumptions, and convinced him they were one hundred forty?

A. I remember telling him the \$75,000 figure was ridiculous and it was \$140,000.

Q. And you did it on the assumption basis?

A. Yes, sir.

Q. You discounted what Mr. Smead knew they had collected prior, I take it? He knew what they had collected?

Mr. Bronson: That calls for a conclusion and we object to it.

Mr. Garrison: Q. Did he tell you that they had collected everything except \$75,000 of those premiums?

A. No, he didn't put it that way.

Q. At any rate, taking your own figure of one hundred seventy you wrote Mr. Will on August 29th that the balance was one hundred forty. I mean you wrote Mr. Will on August 29th the balance was seventy? A. Yes.

Q. And you say you arrived at that figure by the money you picked up here at Oakland of twenty four thousand plus the eight Smead had collected before you got there? A. Yes, sir.

(Testimony of Mark M. Hart.)

Q. And the \$30,000 that they were depositing about that time? A. Yes.

Q. That would be \$62,000. [857]

A. And one other item, that \$4300 item.

Q. What was that?

A. That \$4300 commission check we had deposited.

Q. Well, that hasn't anything to do with agents' balance, does it? We are talking about money owed Lotz by agents. Commission credit hasn't anything to do with that?

A. No, you are correct.

Q. Certainly. A. Yes, sir.

Q. So that you had then collected only \$62,000?

A. Yes, sir.

Q. So your \$70,000 figure was inaccurate, wasn't it, on the basis of your own figures?

A. To the extent of \$8,000.

Q. Well now, I read to you this morning from these teletype payments that had been made by Mr. Smead to you after your Oakland visit. I have computed them in the recess, and deducting eight thousand originally paid, the forty three hundred credit, down to September 15th they had paid you \$70,000, is that correct—round figures?

A. I think that's correct, without looking at that teletype.

Q. So that with the \$62,000 you got August 29th and the \$70,000 they had paid you by September 15th, all of the monies that were allowed Lotz for the account of your company had been collected?

(Testimony of Mark M. Hart.)

A. No. I beg your pardon, you said all of the monies owed Lotz for the account of our company had been collected?

Q. I will withdraw that. You had received \$140,000 by September 15th, on the basis of your own figures?

A. I think that's correct.

Q. So that from some source Mr. Lotz had gotten together \$140,000, which you say was the amount that the agents owed him for business written in your company by September 15th?

A. No, I don't say that.

Q. All right, then let's go over it again. You got \$62,000 by August 29th?

A. Yes, sir.

Q. You were paid in cash by deposit in the American Fidelity account \$70,000 between August 29th and September 15th. That is \$140,000, almost.

A. Yes.

Q. So that to restate my question: You had received through Lotz from some source or other all the monies, substantially, that you say, on your own figures, were owing Lotz by the sub-agents, isn't that correct?

A. No, it isn't; and I would like to explain.

Q. Go ahead.

A. You say that we had received all the monies that were owed to Lotz by sub-agents on our business. That is not necessarily so because I am not in a position to identify the dollars. [859] Some of that money, a large part of that money, may have been commissions that he received on Mid-States business. I can't sit here and tell you, Mr.

(Testimony of Mark M. Hart.)

Garrison, that that's all from premium collections.

Q. Well, your account with him, insofar as funds were actually due from sub-agents, was \$140,000, wasn't it? A. That's correct.

Q. So whatever he paid you over that amount he had to get from his commissions from other companies or out of his own personal funds or from loans or by the use of somebody else's premiums, didn't he? A. He had to get it, yes.

Q. That's right. And what did you mean when you teletyped him on August 17th—September 14th and said to him, "Tomorrow is the deadline with \$190,000"? A. On September 15th—?

Q. September 14th.

A. September 14th. The 15th was the deadline under the agreement.

Q. That's right. "Tomorrow is the deadline with \$190,000."

A. I meant there was \$190,000 outstanding.

Q. Sir?

A. It meant that there was a hundred and ninety thousand dollars of the original two hundred forty outstanding.

Q. That he owed you? [860] A. Yes.

Q. But not in collections that were due him from sub-agents? A. Well, yes; in part, yes.

Q. But he had paid you the one hundred forty at that point.

A. No, he couldn't have paid us the one hundred forty.

(Testimony of Mark M. Hart.)

Q. Well, you received one hundred forty, didn't you? We just computed it.

A. We are getting a little bit confused, Mr. Garrison. You say there is a teletype that shows, "Tomorrow is the deadline with \$190,000", and—
Excuse me.

Q. Go ahead.

Mr. Bronson: (Handing document to the witness.)

The Witness: Thank you.

A. Yes, my teletype says, "Tomorrow is deadline with \$190,000 unpaid". Now, that means that the original balance, there is \$190,000 unpaid to us. Of the monies that had been paid to us up to that date, I can't sit here and tell you how much of that money came out of his accounts receivable and how much came from commission earnings on Mid-States business, either Public Service or the actual Mid-States regular business.

Mr. Garrison: Q. In other words, you don't know where he got the \$140,000 that he paid you up to that point?

A. I can't tell you that offhand, no, sir, that's right.

Q. And it had to come either from your collections or your sub-agents writing for you, or his commissions or his borrowings [861] or somebody's else's premiums?

A. Come from various sources.

Q. Yes. What did he owe you in total on August 29th?

(Testimony of Mark M. Hart.)

A. I can't tell you at this moment.

Q. August 13th? A. \$240,000.

Q. If he had paid you one hundred forty and still owed you one hundred ninety, that is three hundred thirty, isn't it?

A. I didn't say it was one hundred forty.

Mr. Garrison: I think that's all.

Recross Examination

Mr. McCallum: Q. Do you recall testimony yesterday in response to some of the questions that there was a \$34,635 item representing monies that were paid to the American Plan and American Fidelity by payment directly to you in New York?

A. I remember that testimony today.

Q. Was it today? A. Yes.

Q. You do remember that those payments were made?

A. I don't remember it, only by observing them on that auditor's report.

Mr. McKinnon: Pardon me, Mr. McCallum. I would like to reiterate my objection on the grounds previously stated and have a stipulation my objection goes to all questions. [862]

The Court: So understood.

Mr. McCallum: Q. Were any part of those payments made on checks drawn on the Anglo Bank?

A. I couldn't say one way or the other.

Mr. McCallum: Thank you.

Mr. Bronson: Did you conclude?

(Testimony of Mark M. Hart.)

Mr. McCallum: Yes.

Mr. Bronson: That is all, unless you have some explanation of the last answer.

A. I don't think it is necessary.

(Witness excused.)

The Court: Call your next witness.

Mr. Bronson: At this time, we would like to read in evidence, Your Honor, the deposition of Mr. Sudekum taken in New York on October 16, 1952.

(Thereupon the deposition referred to above was read to the Court by Mr. Bronson.)

Mr. Bronson: I had contemplated, if the Court please, that the cross examination of Mr. Hart might be longer and more detailed. I arranged with two witnesses to come here tomorrow morning and they are not here now.

It is true that Mr. Marks is here, the accountant, but that is a new subject. I am going to take the onus this time of asking Your Honor's indulgence for a recess at this time as I would like to conclude with these gentlemen when they [863] come in tomorrow morning.

Mr. Garrison: I am not one to object.

The Court: Very well, we will take an adjournment until ten o'clock tomorrow morning.

Mr. Bronson: Thank you, Your Honor.

(Thereupon this cause was adjourned to May 13, 1954, Thursday, at 10:00 a.m.) [863-A]

The Clerk: Mid-States Insurance Company and Anglo-California National Bank versus American Fidelity and Casualty Company, further trial.

The Court: You may proceed, gentlemen.

Mr. McKinnon: Call Mr. Mead.

WILLIAM B. MEAD

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name, your residence and your occupation to the Court.

The Witness: William B. Mead.

Direct Examination

Mr. McKinnon: Q. Your name is William B. Mead? A. Yes.

Q. What is your residence?

A. 690 Mandana, Hayward.

Q. Your occupation?

A. Attorney at law.

Q. How long have you been an attorney at law?

A. Admitted in 1936 to the State Bar.

Q. California? [865] A. Yes.

Q. Practiced continuously ever since?

A. Yes.

Q. Were you the attorney for Joe Lotz in November and December, 1951?

A. I performed legal services for him during that period of time, yes.

Q. Are you his attorney now? A. No.

Q. How long is it since you have been his attorney?

(Testimony of William B. Mead.)

A. The early part of January, 1952, I ceased to perform any legal services for Mr. Lotz.

Q. Did you have a conversation with Mr. Hatfield, executive vice president of Mid-States Insurance Company, regarding the affairs of your client Joe Lotz on or about December 5, 1951?

A. I had numerous conversations with Mr. Hatfield in the latter part of November and early December of 1951. Do you have in mind a specific subject?

Q. Yes, I have in mind a conversation which I understand took place between you and him in reference to a statement to be procured from Mr. Lotz and Mr. Smead concerning the American Fidelity's operations.

A. Yes, I had such a conversation in my office in the Financial Center Building in the latter part of the afternoon about December 5, 1951, on that subject. [866]

Q. Any one else present?

A. No one else was present.

Q. What was said?

A. Mr. Hatfield told me that officials had talked to them indicating to him that there was a possibility Mid-States Insurance Company had grounds for a lawsuit against American Fidelity and Casualty Company. He stated that he would like to have a statement from Mr. Lotz and possibly from Mr. Smead, and that if I was their attorney at that time, he wanted me to arrange to have such a statement made.

(Testimony of William B. Mead.)

Q. What did you say?

A. My reply to him was that I certainly would have no objection to the facts, whatever they might be; however, I insisted upon having Mr. Lotz and Mr. Smead come into my office to have any statement prepared under my supervision.

Q. What then occurred?

A. I then picked up the telephone and, in Mr. Hatfield's presence, called Joe Lotz. I told Mr. Lotz Mr. Hatfield was in the office, that Mr. Hatfield wanted a statement of facts concerning the relationships of Joe Lotz and his agency with American Fidelity and Casualty and American Plan, and that he wanted Joe to come over next morning at ten o'clock and to bring Mr. Smead with him. Mr. Lotz stated he would be there at ten o'clock next morning and bring Mr. Smead.

Q. Anything further said by Mr. Hatfield? [867]

A. No. I then related my conversation to Mr. Lotz to Mr. Hatfield, and told him that next morning they would be in my office and I would prepare statements of fact concerning the subject he was interested in, and that after the statements were prepared I would communicate with him.

Q. What did he say then?

A. He said fine, and he would get in touch with me next day.

Q. Was there anything further in that conversation?

A. That is all that I recall at this time.

Q. Did Mr. Hatfield leave then?

(Testimony of William B. Mead.)

A. Yes, he left.

Q. Did they come next morning at ten o'clock?

A. No, sir.

Q. What happened?

A. Between 10:15 and 10:30 I telephoned Mr. Lotz and asked him why he didn't keep the appointment at ten o'clock. He then advised me that the night before Mr. Hatfield had stayed with him and with Mr. Smead until very late, approximately midnight, and that statements had been made that night.

And I said, "Well, where are the statements? Bring them over here right away." And he said he didn't have them. I said, "Where are they?" He said that as soon as the statements were written out Mr. Hatfield took them and left.

Q. Do you recall a conversation that took place shortly thereafter with Mr. Lotz and others relating to the statement? [868]

A. Yes.

Q. Please state where it took place and who was present?

A. As I recall, it was the next evening—or that evening, that is, the evening following the day Mr. Hatfield was in my office. There was a meeting that took place at Joe Lotz' office, in the downstairs back portion of the room.

At that meeting was Joe Lotz, Ralph Smead, Mr. Titus, Mr. Hatfield, I think Mr. Jack Lotz was in there, in and out of the area but did not participate, as I recall, in any conversations. I don't re-

(Testimony of William B. Mead.)

call specifically, but Mr. Oldberg was possibly in and out of the conversation.

Q. What was the conversation on that occasion?

A. Mr. Titus had some handwritten statements on yellow paper and stated that he wanted Joe Lotz to verify the statement. He wanted a notarial verification made of the statements.

I told him on that occasion that I was rather amazed at the fact that after reaching an agreement with Mr. Hatfield that the statements would be prepared in my office, that then I found that they were prepared in an entirely different manner. I told Mr. Titus if he wished to deliver the statements to me then and there we would then go ahead and prepare a factual statement of the subject matter desired.

Mr. Titus refused to part with the statements. I then told him I *would permit* Joe to swear to any statement that I had not gone over with him in great detail, and then Mr. [869] Titus said, "Well, if we have a lawsuit arising out of this thing I don't want Ralph Smead and Joe Lotz denying their signatures."

I said, "There's nobody going to deny their signature. But," I said, "that is the only part of the statements that I know at this time is true."

I turned to Smead and Lotz and said, "You don't deny your signature, do you?" And they said "No."

So then I told Mr. Titus that that was the extent of what would be verified at that time, and hence I used a notary's acknowledgment form which goes only to the signature.

(Testimony of William B. Mead.)

Q. I show you a ten-page handwritten document which has been introduced in evidence here as Plaintiff's Exhibit 11, and I ask you if this is the statement which was shown to you by Mr. Titus on that occasion.

A. I am looking at Plaintiff's Exhibit 11. I do not identify it by the pages other than the last page, which has the notarial acknowledgment form that has my signature and seal; and this was placed on here on December 6th by me in my notarial capacity verifying the signature only of Ralph Smead.

The balance of it, I do recall that the statement was on yellow sheets and written in pen and ink, but I did not at that time and I never have to this day read the statement or any of the statements made.

Q. Had you ever seen it prior to that occasion?

A. That was the first occasion, December 6th in the evening, at that evening meeting, that I saw the papers that purport to have the statement of the party.

Q. On that occasion were the signatures of Ralph L. Smead and Joe Lotz already on the document or not?

A. My recollection is that the signature of Ralph L. Smead was already on the document, and I asked him to state whether or not that was in fact his signature, and on the basis of that I acknowledged his signature.

Q. What happened to the statements following this conversation?

(Testimony of William B. Mead.)

A. They were never out of the possession of Mr. Titus. They were simply placed on the desk with Mr. Titus standing next to it, and in that position I placed the acknowledgment form upon it.

Q. Did Mr. Titus or anyone else take the statement away after that conference?

A. Mr. Titus proceeded to take it back in his hand and never relinquished possession in my presence.

Q. There is evidence in this case of other written statements having been made following that. Have you ever seen another written statement of either Lotz or Smead concerning this matter?

A. To my knowledge I have never read any of them. I have heard of their existence.

Q. Turning to another subject, Mr. Mead, do you recall the [871] return of Joe Lotz from Chicago some time in the summer of 1951 following a conversation between Lotz and the Mid-States executives in Chicago?

A. Yes. I don't recall the exact date, Mr. McKinnon, but I do recall the occasion.

Q. Do you recall Mr. Lotz telling you of a conversation he had with Mr. Titus in Chicago on that occasion?

A. Yes, I do.

Q. Please state what he said.

A. Mr. Lotz was very elated upon his return from Chicago. He said that the Mid-States people were certainly wonderful. He said that he had an occasion to meet Mr. Titus, and that Mr. Titus came into Mr. Hatfield's office while he, Joe Lotz, was

(Testimony of William B. Mead.)

talking with Hatfield, and that Mr. Titus shook hands with him and said, "Joe, I heard you are having a little trouble," and Joe said he told him that he was, and Titus said, "Well, we will do everything we can to help you solve your problems."

Mr. McKinnon: That is all.

Cross Examination

Mr. Garrison: Q. Mr. Mead, wasn't there a meeting in your office on one of these evenings with Mr. Hatfield and Mr. Lotz and Mr. Titus and Mr. Smead?

A. Prior to the occasion of these statements arising, there were a number of meetings in connection with the matter that [872] culminated on November 27, 1951, but Titus was not a participant in any of those.

Q. I am talking about the meetings in connection with this statement of Ralph's.

A. You mean prior to the statement——

Q. Yes. A. ——or subsequent?

Q. Prior. A. No, I recall none.

Q. Your recollection is that at the time the seal was attached you were in Joe's office?

A. Oh, very definitely in Joe's office. That is, not strictly Joe's office, but downstairs.

Q. I understand what you mean. And are you sure about Ralph's signature being on the statement when you first discussed it?

A. You mean when I first put the acknowledgment form on it?

(Testimony of William B. Mead.)

Q. No, when you first arrived and the subject was discussed.

A. When the last page of this statement was first shown to me I am certain his signature was on it because I do recall asking him if that was his signature.

Q. You don't know whether it had just been signed or whether it had been signed for some time?

A. It may have been signed just before that or earlier, I don't know. [873]

Q. Mr. Lotz had not signed his up to the time you have arrived on the scene?

He signed it in your presence, didn't he?

A. It may be, but I wouldn't be definite about whether Joe signed it. You mean referring to the signature on the margin?

Q. Yes, on this back page.

A. I don't recall specifically whether he signed it down there or whether that was already on, Mr. Garrison.

Q. Didn't Mr. Hatfield say to you on that occasion that the document had been written out by Ralph but had not been signed, waiting until you could see them—until they could see them with you and discuss it?

A. No such statement was ever made to me by anyone on that occasion.

Q. And weren't his words to that effect his explanation of having gone ahead in advance of the meeting with you on the day of the appointment?

A. There was no explanation accorded to me in

(Testimony of William B. Mead.)

in that regard. Mr. Titus was very definite that he would not give up the statement and he would hang on to it, and in spite of my protests as to the manner in which the statement was taken, it had no effect.

Q. Well——

Mr. McKinnon: Please let the witness answer, will you?

Mr. Garrison: I am sure Mr. Mead will complete his answer. [874] We won't interrupt him if he hasn't finished.

The Witness: A. The only point there, Mr. Garrison, is that Mr. Titus was very adamant that he would not permit me to have the statement and that they would stand on the statement. I do recall very distinctly saying that I had no idea whether the statement itself contained all facts or half facts or opinions or whether it was only a partial story.

Mr. Garrison: Q. You have gone all over that on direct examination. I didn't ask you about that. How does it happen that you had your notarial equipment with you over there at Mr. Lotz' office? Did you bring it along?

A. No, there was a seal over in that office. I borrowed a seal.

Q. And you had a form there, I assume?

A. There were forms in that office. I didn't have them with me, no.

Q. I see. I see. Well, you are not sure whether the writing here that Mr. Lotz put on, which reads, "I have the statement of Mr. Smead and as to

(Testimony of William B. Mead.)

all occasions when I was present it is a correct statement. Joe Lotz."

I believe you say that you are not sure whether that was written and his signature attached when you were there or not.

A. No, on that little phrase I don't have a clear recollection, Mr. Garrison. [875]

Q. Did you notice the writing there, Mr. Mead? Maybe that would bring it back to your memory.

A. It may well be that Joe did write that while I was there.

Q. I think he did.

A. I wouldn't be positive about it, but it may well be that he did.

Q. He did testify he signed it when you were present. As I understand it, the truth of the statements in here, in the statements made in the document, were never brought into question in the discussion?

Mr. Bronson: That calls for a conclusion of the witness, if the Court please.

Mr. Garrison: In the discussion.

The Court: Was there any discussion to that effect?

The Witness: A. Yes, there was, Your Honor. The discussion was between Mr. Titus and me, as I recall. Mr. Titus said, "Well, we are going to rely on the statements and prove them," and I said, "Well, I don't know whether they contain facts or whether they contain partial facts or whether they contain fabrications." The statements were not made

(Testimony of William B. Mead.)

under my supervision and I had no intention of checking into them at this point to attempt to verify or not verify.

Mr. Garrison: Q. I had reference to the truth of the statements. Mr. Lotz nor Mr. Smead indicated to you at that time in any way that the statements were not true, did they? [876]

A. I asked Mr. Lotz in the presence of the other gentlemen if he knew whether or not there were facts stated and he did say, "I have no idea really what is in it."

Q. Why would he write on the statement that the statements were true if he didn't know?

Mr. Bronson: That calls for a conclusion, Your Honor. We object to it.

Mr. Garrison: I will withdraw the question.

Mr. Garrison: Q. Let me show you Plaintiff's Exhibit 20, which is a full page statement in typed form on plain paper, and ask you if you have ever seen that or not, if you have ever seen that statement? I might further identify it by saying that is the one that was dictated and typed in my office.

A. This is the first time, Mr. Garrison, that I have seen this memorandum entered as Plaintiff's Exhibit 20, and I have never seen a copy of it either.

Q. Do you remember having a telephone conversation with me shortly before this statement was prepared, at which time I told you that I had an appointment with Mr. Lotz and Mr. Smead, and that I was going to take a statement, and invited you to come to my office and participate.

(Testimony of William B. Mead.)

A. I recall the conversation that you advert to, Mr. Garrison. I believe that you asked me, "Do you have any objection to my taking a further statement from Mr. Lotz and Mr. Smead at my office?"

My reply to you was that there had been so many statements taken under circumstances in which I had no opportunity to verify or discharge my duty to Mr. Lotz or Mr. Smead, and because I do not have any general retainer as his attorney, but am called upon from time to time to perform services for him, I wouldn't under those circumstances have any objection if you wanted to take a statement.

Q. I think that at that time you said, also, you were engaged in trial and on the particular date it wasn't convenient so far as you were concerned.

A. That is correct. From about November 15th until the end of December I had about six jury trials.

Q. I think I remember that.

A. And that is why so many night meetings were held.

Q. And we did discuss this subject on the telephone from time to time, too, after the statement was taken?

A. We didn't discuss any subject matter.

Q. Not the statement. We did have conversations from time to time.

A. We had several. I believe they were prior to that, though, Mr. Garrison.

Q. Didn't we talk after that?

A. I don't believe we talked after that until sev-

(Testimony of William B. Mead.)

eral months ago. The only other phone conversation——

Q. (Interposing) Well, what—— [878]

Mr. McKinnon: Well, wait a minute. You interrupt and we don't get the end of these answers.

Mr. Garrison: I am sorry. Mr. Mead isn't going to be intimidated by my interruptions.

Mr. McKinnon: It isn't a question of intimidation, it's a question of getting the answers.

Mr. Garrison: Oh, Mr. Mead is a lawyer. He can give his answers.

Mr. McKinnon: Well, I would like to make an interruption. I would like to interrupt and protest against counsel's interrupting the answers of the witness before the reporter has had an opportunity to record it. The record will later show what the reporter puts down, not what is in Mr. Garrison's mind. I would like to protest against these constant interruptions.

The Court: Will you——

Mr. Garrison: (Interposing) I will be very happy not to interrupt.

Mr. Garrison: Q. If you have anything further to add to any statement you are making, please say so.

The Witness: A. I think that that about covers it, substantially.

Q. I thought so. My point was, Mr. Mead, that there wasn't ever any feeling on your part that a copy of this statement that I took was not at all

(Testimony of William B. Mead.)

times available to you had it been necessary for you to have one, was there? [879]

Mr. McKinnon: That calls for his feeling. I object to that. He can ask for facts.

Mr. Garrison: I withdraw the question.

Mr. Garrison: Q. You didn't ever ask for a copy of the statement and have me decline to give you one, did you? A. No, I did not.

Q. You made reference a moment ago to your representation, and I wasn't sure whether you indicated that you were representing Mr. Smead as well as Mr. Lotz or just Mr. Lotz.

A. I was representing Mr. Lotz, and Mr. Smead only incidentally as an employee of Mr. Lotz.

Q. So that at the time of the signing of the acknowledgment by you of the signatures on the document, you were representing Mr. Lotz directly and Mr. Smead as his employee?

A. That is correct.

Mr. Garrison: That is all.

Mr. McKinnon: That is all.

(Witness excused.)

Mr. Bronson: Mr. Feller, please.

SAMUEL R. FELLER

called as a witness on behalf of the defendant herein, and being first duly sworn to tell the truth the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: State your full name and occupation to the Court.

The Witness: A. Samuel R. Feller, attorney.

Direct Examination

Mr. Bronson: Q. Where do you live?

A. Ten Park Avenue, New York City.

Q. And you stated your occupation is that of attorney? When were you admitted to practice?

A. I was admitted to practice in the courts of New York in 1928.

Q. And what relationship have you with the American Plan? A. I am its counsel.

Q. Since what time?

A. Well, since the formation of the company.

Q. When was that?

A. I don't recall the exact date. It was a number of years back. I would guess six or seven years.

Q. Now, do you work for that company on a salary or are you engaged in a private practice?

A. No, I am engaged in private practice. I am a member of the firm of Boyle, Feller and Reeves, 25 Wall Street, and I have a retainer from American Plan.

Q. Could you state, referring to the time that we are concerned with here, 1951, about how frequently would the duties that you are called upon

(Testimony of Samuel R. Feller.)

to perform as an attorney bring you to the offices of the American Plan?

A. I would say I was in the offices of the American Plan several times a week. [881]

Q. And their business is that of what?

A. They are the United States managers for—I beg your pardon, they are the managers for insurance companies, particularly in the writing of automobile physical damage.

Q. Among the companies for which they act as managers, do they have the American Fidelity and Casualty Company, one of the defendants here?

A. Yes, sir.

Q. And those operations bring your client into how many states of the Union, roughly—that is to say the American Plan?

A. It is a nation-wide operation.

Q. And speaking still of the time that I mentioned, do they operate through general agents in some states of the United States?

A. Yes, sir. [882]

Q. They had other plans of representation in other states of the Union?

A. That is right.

Q. Now, speaking now of Mr. Joseph Lotz, when did you first hear of that gentleman?

A. The first time I heard of Mr. Lotz was in 1951 in August.

Q. And did you see him at that time?

A. Yes, I did.

Q. And where did you see him?

(Testimony of Samuel R. Feller.)

A. I saw him in the offices of the American Plan, which were then located at 44 Wall Street.

Q. And what were the circumstances of your being there on that day?

A. As I recall it, I received a telephone call from Mr. Hart who asked me to come to the office to sit in on a meeting that he was having with one of his agents.

Q. Tell us who was there, please.

A. Those present at the meeting were Mr. Hart, Mr. Sudekum, Mr. Will, Mr. Lotz, Mr. Smead, and I.

Q. And Mr. Hart had been identified as president, Mr. Will as treasurer, and Mr. Sudekum as vice-president—

A. I believe he was executive vice-president at that time.

Q. —of the American Plan; that is correct, isn't it? A. Yes.

Q. Now, will you state what transpired at that meeting in the [883] way of conversations between the parties? First, I will ask you to give your estimate of the amount of time that was taken up with the meeting with these two gentlemen.

A. I believe I was there for approximately an hour and a half, but I am not absolutely certain of that.

Q. Will you relate what you can recall of the conversation?

A. As I recall the conversation, Mr. Hart asked Mr. Lotz as to what his situation was, his financial

(Testimony of Samuel R. Feller.)

situation, particularly with regard to the premiums they were owing to the American Plan.

Q. There was some money due, in other words, is that right?

A. Yes, there was some money due which hadn't been paid. I think an amount of six or seven thousand dollars, as I recall it. And Mr. Lotz explained that as a result of very rapid expansion he was strained for cash.

He went on to discuss the fact that he had in process a loan of \$100,000. There was also considerable discussion with regard to his loss ratio, discussions back and forth between Mr. Lotz and the representatives of the American Plan.

Q. Do you remember any discussion about what the amount of money was he owed, that is, on all premiums up to that time, to the American Fidelity and Casualty Company, and what resources he had, what assets he had?

A. I don't recall the exact figure, but in round figures, however, my recollection is that he owed American Plan at that [884] time, or at or about that time, something in the neighborhood of \$250,000.

As I recall it now, there was a figure mentioned of approximately \$150,000 there as the amount coming in from sub-agents. There was also reference to the loan which I have mentioned, and there was reference to the fact that he had an accumulation or would have an accumulation of commissions due

(Testimony of Samuel R. Feller.)

him from the American Plan on the business which had been written.

Q. When Mr. Lotz was mentioning this matter of having grown rapidly and being strapped, if I can use the term, for cash, about what his relationships with another company, namely, Mid-States Insurance Company, had been, and what the status of his account was, do you have any recollection of a discussion of that company at this meeting in New York?

A. Well, I think, as I recall that, that Mr. Lotz during the course of the conference I have mentioned—"What happened to some of our money," you see—and he said, as I recall it, "I have used it to pay Mid-States and to pay operating expenses."

Q. Now, you were there as, if I can suggest it, you were there as an attorney?

A. That is right, sir.

Q. You didn't have any position in the company?

A. No, I am not an official of the company.

Q. Did you have any discussion, that is, in the presence of [885] Lotz or Smead, during the discussion or at the end of it, about your views on the state of the loss account with American Fidelity and Casualty?

A. I felt, and I explained my views to those present, that I didn't see any great problem in the situation; that I felt on the basis of the discussion the matter should be worked out effectively. I may not have used that exact expression, but that was the purport of my remarks.

(Testimony of Samuel R. Feller.)

Q. Have you any recollection on the subject of the Mid-States Insurance Company and a prepaid commission plan to Lotz?

A. Yes, sir. I recall Mr. Lotz saying that he felt he would have to revise his method of operations and that he was looking for a prepaid commission, and mentioned that he believed he could obtain a deal of that kind from Mid-States Insurance Company.

Q. Now, were any documents drawn up at the time of this meeting, by you or anybody else, arising out of the meeting? A. No, sir.

Q. Any letters written? A. No, sir.

Q. And when you expressed your views to those present, including Lotz and Smead, that the problem that had been discussed didn't appear to be a serious one, what was the nature of—what was the final result of the meeting, then? A. Well—

Q. Was anything done at all with respect to the problem except the discussion that you have mentioned?

A. That is right, sir. My answer is that—I am sorry—my answer is that nothing else was done.

Q. Did you see Mr. Lotz and Mr. Smead on the same day at another time or place?

A. I did.

Q. When and where was that?

A. I saw them that evening at dinner. Mr. Hart had—I was invited to have dinner with them by Mr. Hart pursuant to a telephone conversation.

(Testimony of Samuel R. Feller.)

Q. Was there any discussion of business affairs at that meeting, to your recollection?

A. To the best of my recollection, the discussion was of a social, and more particularly of a sports nature; and I think I remember quite definitely that Mr. Lotz expressed surprise that, despite the fact that my last name was the same as that of a very famous baseball player, I was not very well versed in baseball and was not a baseball fan.

Q. You learned Mr. Lotz had a background of professional baseball?

A. I gathered he was a very well known figure in the sports field.

Q. Referring, finally, on this phase of the examination to this meeting when business was discussed at the American Plan [887] office, have you any recollection of a discussion that brought in the name of a Mr. Cass?

A. I don't recall mention of his name.

Q. Have you any recollection of an incident of a telephone call put in from that office to Chicago for Mr. Lotz?

A. I have recollection that Mr. Hart used the machine, whatever it is called, the enunciator, and asked the operator to place a call for Mr. Lotz.

Q. Does your recollection serve you so far as another subject in that connection, that Mr. Hart said something to the effect that the source of that telephone call was to be concealed from the people on the other end?

A. I don't recall any reference to concealment

(Testimony of Samuel R. Feller.)

or anything hidden during the course of that meeting.

Q. Was the name of an insurance company called Public Service Insurance Company brought into that conversation?

A. I don't recall any such reference.

Q. Was there any reference to insolvency as applied to Joe Lotz in that meeting?

A. No, sir. Quite to the contrary.

Q. Or him being broke? A. No, sir.

Q. Now, when did you next see Mr. Lotz and Mr. Smead?

A. It was about a week thereafter in Oakland.

Q. In Oakland? And will you state briefly the circumstances [888] of your going to Oakland?

A. I received a telephone call from Mr. Hart while I was in the country in Connecticut, which was either Friday or Saturday, I don't recall, and Mr. Hart asked me to accompany him to Oakland. There had been an arrangement made, a tentative arrangement made for Mr. Hart and me to be in Los Angeles during that week on a wholly unconnected matter.

Q. Yesterday I made an objection to some evidence and it was sustained, and I spoke to you about it last night. A. Yes.

Q. Have you any reason to withhold in this court the statement of what that business was?

A. Not in the slightest.

Q. Well, what, briefly, were you going to Los Angeles for?

(Testimony of Samuel R. Feller.)

A. Mr. Hart and I had been working for some time prior to that particular period that you refer to with officials of a company in Los Angeles known as the Union Service Company, and the particular project was the furnishing of automobile insurance on a wholesale basis to members of unions located in and about the Los Angeles area, and we had arranged to have the conference in Los Angeles with officials of that company and their attorney.

Q. Who is their attorney?

A. Edmund W. Cook.

Q. What was the date you had for that appointment? [889]

A. I believe it was the 22nd.

Q. What day did you arrive in Oakland?

A. I believe it was the 20th, Mr. Bronson.

Q. I want to go back to another thing which slipped my mind, if I can be excused in going back to the New York date.

Mr. Bronson: I am jumping around, Your Honor, but these things come back to me.

Q. Going back to the New York meeting of the 15th of August, do you have any recollection of a statement from anybody there, specifically either Mr. Sudekum or Mr. Will or Mr. Hart or yourself, to the general effect, "What will Mid-States do if they know our position in this matter?" And a response from Mr. Hart, purported response from Mr. Hart, "We will worry about that when we get to it. All we are interested in is getting our money."

Have you any recollection of an exchange of con-

(Testimony of Samuel R. Feller.)

versation such as that? A. I have none.

Q. Coming back to Oakland again, you arrived here on the 20th? About what time of day did you get here on the 20th of August, 1951?

A. My recollection, Mr. Bronson, is that we had been delayed considerably in arriving here because of a storm, and that we got here at about noon. It might have been even later than that. [890]

Q. Who did you first see and where?

A. My recollection is on that that Mr. Hart and I met Mr. Lotz and Mr. Smead for lunch. I don't recall where. It wasn't at the hotel. It was at a restaurant in Oakland.

Q. That was, roughly, about midday on the 20th?

A. It may have been even later.

Q. What day did you leave Oakland?

A. We left Oakland two days later. I believe it was in the very early afternoon. It may have been noon time.

Q. So you had roughly about two days there?

A. Just about.

Q. And during any of the time you were there was there any audit or examination of the books and records of Joe Lotz made? A. No, sir.

Q. Did you personally look at or discuss with either Lotz or Smead the condition of the books on that occasion?

A. I don't recall whether it was discussed or not, but I remember quite distinctly and definitely, during the course of the discussions generally, mention was made by either Mr. Smead or Mr. Lotz

(Testimony of Samuel R. Feller.)

or both that their postings and other recordations of their books were considerably behind.

Q. Was any tape, that is, an ordinary adding machine tape, run off and delivered to Mr. Hart or yourself, to your recollection?

A. It wasn't delivered to me and not delivered to Mr. Hart in [891] my presence.

Q. At any time in your presence was any request made by Mr. Hart for a runoff of any figures or data?

A. I don't recall about—I am not sure of the technical term. I recall Mr. Hart asking for a breakdown as to the amounts that were owing by individual agencies.

Q. Was that delivered to Mr. Hart, to your knowledge? A. Not in my presence.

Q. With regard to the figures that have been discussed in New York, namely, the amount owing, total amount of premiums owing by Lotz to American Fidelity and Casualty, and the receivables, that is, the receivables of Mr. Lotz, was there a discussion of that in Oakland and, if so, will you give us briefly what it developed?

A. I am quite sure, Mr. Bronson, there were discussions. I don't recall anything in the discussions that changes my recollection as to the figures I mentioned before.

Q. You mean the situation was approximately the same? A. Substantially the same.

Q. Was there any mention made in the discus-

(Testimony of Samuel R. Feller.)

sions with Smead and Lotz on the one side and yourself and Mr. Hart on the other about Public Service business at that Oakland meeting?

A. I believe there was reference to a Public Service deal that they had worked out and that would be the source of a substantial commission income to them—to the Lotz Agency. [892]

Q. Your recollection doesn't serve to develop what the name of the company that the rewrite or deal was? I mean, was that the Public Service, do you know?

A. I thought I answered that and said that.

Q. What was the nature of that business as to the type of writing it was? Was it mentioned as a reinsurance, as a direct insurance, as a rewrite, or what?

A. I believe the term "rewrite" was used in that connection.

Q. You are familiar with that term?

A. Surely.

Q. And were that day? A. Pardon me?

Q. You were familiar that day with the expression "rewrite"? A. Yes, surely.

Q. And reinsurance? A. Yes.

Q. Do you know the difference?

A. Yes, certainly.

Q. Was a cancellation of the agency effected while you were there? A. It was.

Q. That is, the agency between American Fidelity and Casualty and Lotz.

A. Yes, it was.

(Testimony of Samuel R. Feller.)

Q. Did you have anything to do with that? [893]

A. No.

Q. Whose decision was that?

A. Mr. Hart's. It was a business decision.

Q. Do you know when it was reached?

A. My recollection is that it was reached by Mr. Hart the day before we left, which would be, I presume, the 21st.

Q. Did you take any part in an attempt to get a loan for Joe Lotz?

A. Yes, sir, I took a very active part.

Q. And did that have anything to do, so far as your knowledge of the situation, with the cancellation you just mentioned, or was it independent?

Mr. Garrison: That is objected to on the ground that Mr. Hart's decision and what motivated it——

Mr. Bronson: (Interposing): I think that's right.

Mr. Garrison: ——would be something——

Mr. Bronson (Interposing): I think that's right. Withdraw the question.

Q. In any event, what was done about securing the loan for Joe Lotz insofar as your activities were concerned?

A. Well, in the first afternoon of the first day we were there, which would be the 20th, I spent a considerable amount of time with Mr. Mead on that subject. Mr. Mead, as I understood it, had been attempting to obtain a loan for the Lotz Agency from, I believe, private sources. [894]

The next day, which was the 21st, I spent a very

(Testimony of Samuel R. Feller.)

considerable part of the day, very substantial part of the day, having a conference with various officials at the Central Bank.

Q. Did Mr. Hart take part in that with you or was that yourself alone?

A. Well, Mr. Hart was there during a substantial part of the time.

Q. Were there legal questions involved in the loan discussions?

A. Yes, there were several legal questions.

Q. Mention some of them.

A. The primary problem that I was attempting to solve was the desire of the Central Bank to have a document executed by the American Fidelity and Casualty Company covering the earnings, future earnings of the Lotz Agency on business which had been written, and the bank was concerned with what would happen if cancellations ensued and how firm a commitment after the collateral could be made by the agency.

And there were numerous drafts and documents which I drew up in an attempt to prepare something which would be satisfactory to their counsel as well as the loan committee, and I had conferences with at least three or four different people and possibly more.

Q. And there were come tentative drafts of documents drawn up? A. Oh, yes. [895]

Q. Did you get any decision from the bank, either approving or disapproving a loan to Joe Lotz? A. No, we did not.

(Testimony of Samuel R. Feller.)

Q. They neither approved it or disapproved it?

A. No.

Q. They just didn't act on it, is that what you are saying?

A. My recollection is that they said it would have to be referred to a committee.

Q. What was the amount of the loan under discussion?

A. My recollection is that it was \$50,000.

Q. That took up most of your day?

A. A good part of it, yes.

Q. Now, were any documents of the legal nature drawn by you during your stay in Oakland?

A. There were two documents drawn which are among the exhibits in this case.

Q. No. 1 is what?

A. No, 1 is the agreement with Joe Lotz dated the 22nd, and the second is the letter addressed to Ralph Smead which is erroneously dated the 17th.

Q. The cancellation which is an exhibit here, a letter addressed to either American Plan or American Fidelity by Joe Lotz, was that also prepared by you?

A. I am not sure whether it was prepared by me or whether it was prepared by Mr. Hart, but in any event, I looked it over [896] before it was put in final form.

Q. So in effect there were three documents that were prepared there in connection with the visit of you and Mr. Hart? A. Yes, sir.

Q. And to go over them again, there was the

(Testimony of Samuel R. Feller.)

agreement of August 22nd, the two-page type-written agreement, a letter addressed to Mr. Smead which refers to the sum of \$1,000—am I right in that? A. Yes.

Q. —and, third, a cancellation notice.

A. That is right.

Q. Referring to the agreement and the letter to Mr. Smead, who prepared those? A. I did.

Q. And when and where did you prepare them, and how?

A. Those two documents to which you have made reference, Mr. Bronson, were prepared by me on the night of the 21st at the Leamington Hotel, and I wrote it out on hotel stationery—I wrote them out in longhand on hotel stationery, as I recall it.

Q. Then they were subsequently typed, were they? A. They were.

Q. When and where was that done?

A. Those documents were typed at the Central Bank in Oakland.

Q. On what day? A. On the 22nd. [897]

Q. And subsequently the letter of Mr. Smead, according to the testimony here, was placed in an envelope, sealed and handed to Mr. Smead, is that correct? A. That is right.

Q. And the other document, the agreement, was typed and according to the testimony here was signed by the parties whose signatures appear on the second page, and I am asking you how many copies of that were prepared and where were the copies left?

(Testimony of Samuel R. Feller.)

A. I don't recall the exact number of copies that were prepared. There were a number of copies prepared, and a copy of the document, the agreement with Joe Lotz dated the 22nd, was left with Mr. Smith at the Central Bank.

I don't know whether I mentioned in response to your question, Mr. Bronson, that the typing of these documents was done at the Central Bank by a secretary furnished by Mr. Smith in his office or in the office of the bank. That is where the documents were typed, and my recollection is that they were signed there.

Q. Were Lotz and Smead there during any part of that morning?

A. Yes, sir, they came over.

Q. Where were the signatures placed on the document? At the bank?

A. At the bank. That is my best recollection.

Q. And did that conclude the services you performed for your [898] client at Oakland, or were there any others? A. No, that is all.

Q. Then you stated you left some time roughly around noon time of that day?

A. That is right.

Mr. Bronson: That is all.

Cross Examination

Mr. Garrison: Q. Mr. Feller—

A. Yes, sir?

Q. —you referred to the cancellation of the Lotz Agency by Mr. Hart as being a business deci-

(Testimony of Samuel R. Feller.)

sion. I take it that you make that distinction because you furnished the legal services as distinguished from business services?

A. That is right.

Q. And your practice is a general practice?

A. It is.

Q. This meeting in New York lasted how long?

A. My recollection is that, as I said before, the meeting lasted approximately an hour and a half. It may have been a little more, it may have been a little less.

Q. And a lot of back and forth discussion?

A. Quite a bit.

Q. Between principally, I imagine, Hart and Smead?

A. Hart, Smead and Lotz, I would say. [899]

Q. Did Mr. Hart tell you any reason why he needed his lawyer there at that meeting on that occasion?

A. You mean at the dinner meeting?

Q. No, at the office.

A. My recollection is, Mr. Garrison, when he called me he said, "I would like—", as I said before, without being overly repetitious—"I would like you to sit in on a meeting that I am having with an agent." He might have said, "It is a collection problem", it is entirely possible.

Q. I assume it isn't normal for you to sit in on meetings with all their agents when they come to town?

A. No, sir, of course not.

Q. The discussions that went back and forth

(Testimony of Samuel R. Feller.)

between Smead and Hart regarding balances and volume and loss ratios and rewrites in other companies, and so forth, those were not legal problems? Those were insurance underwriting problems?

A. Quite so.

Mr. Bronson: He hasn't said there were any discussions of rewrites in other companies, and that part of the question assumes a fact not in evidence, and we ask that it be stricken.

Mr. Garrison: I will strike out the word "rewrite". I mean insurance or reinsurance, and so on.

Q. So that that wouldn't be something that you would participate in particularly?

A. It would be something I——? [900]

Q. That discussion, that phase of the discussion, wouldn't be something that you——

A. (Interposing) That is right, yes.

Q. Yes. You were there in the event specific legal problems arose? A. Precisely.

Q. And you are not purporting to say to this Court that you can recall all of the conversation that occurred between those people in that office?

A. I have given by best recollection, Mr. Garrison.

Q. And the question is that you don't purport to say that you recall all the conversation that occurred there?

A. I certainly don't purport to recall every word that was uttered in 1915.

Q. Certainly not. Certainly not. Don't you remember, however, at that meeting that Mr. Hart

(Testimony of Samuel R. Feller.)

told Mr. Lotz that he better not write any more business for American Fidelity?

A. I do not recall that, sir.

Q. Didn't he say something about he was going to suspend his writing business for American Fidelity?

A. No, sir.

Q. Well now, when you looked this letter over of August 22nd, which I understand you to say you believe Mr. Hart prepared—Mr. Hart said he did prepare it—what did you think Mr. Hart meant in that letter when he said, "Pursuant to my discussion [901] with your Mr. Hart in New York we are cancelling your contract"?

Mr. Bronson: Do you want him to guess what Mr. Hart meant when he dictated the letter?

Mr. Garrison: He looked the letter over and passed on it, he says, and I wondered if in looking it over and passing on it, it brought anything back to his mind about the New York discussions.

The Court: Does that refresh your memory in relation to any matter you testified to?

A. Well, it does refresh my recollection, Your Honor, to this extent: that, as the first sentence goes on to say, "and particularly in pursuance to my discussion with your Mr. Hart, and particularly in view of your inability to comply with my request for a prepaid commission", it seems to me it would have a very definite reference to the discussion there, Mr. Garrison.

Mr. Garrison: Q. Yes, that is my point. That doesn't—

(Testimony of Samuel R. Feller.)

A. (Interposing) A discussion with regard to the inability to meet his request.

Q. And cancellation of his contract.

A. I beg your pardon?

Q. And the cancellation of his contract?

A. No, sir, it doesn't say that at all.

Q. Well, it says, "Pursuant to our discussion", and, "We are cancelling your contract"?

A. "And particularly in view of your inability to comply with [902] my request." Perfectly apparent what that clause means.

Q. That is your interpretation?

A. Yes, it is, sir.

Q. You say that in your presence you didn't observe anyone handing Mr. Hart a tape showing a column of figures representing the balances due those companies?

A. That is my testimony, yes, sir.

Q. And you didn't see anyone hand Mr. Hart tapes showing accounts receivable from agents?

A. No, sir.

Q. Well, you work in Oakland two days, you say? A. Yes.

Q. And for almost all of one day you were at the bank? A. That is right.

Q. And where were you on the second day?

A. Well, the second day we were over at the bank as well having these documents prepared.

Q. Were you in Lotz' office the first day?

A. I was there the first day, yes, sir.

Q. But you weren't on the second?

(Testimony of Samuel R. Feller.)

A. If I was, it wasn't for very long.

Q. I see. You don't recall Mr. Hart asking for any figures as to the amount of premiums written and the balance of receivables in the Lotz Agency?

A. No, sir. [903]

Q. And your purpose in going out there was to determine what the facts were with respect to Lotz' records, wasn't it?

A. I don't believe so. That wasn't my purpose. I don't believe that was the purpose in having me go out there. I think I was asked to go out there primarily in connection with this loan situation.

Q. Didn't Mr. Hart say to you he was concerned about Mr. Lotz' affairs?

A. I believe he told me the collections hadn't developed as had been indicated in the oral meetings, and that they had run into a problem with respect to the loan.

Q. He told you that Smead had only been able to collect \$8,000?

A. I don't recall Mr. Hart mentioning any specific figures to me.

Q. You heard in the New York meeting Lotz owed your company roughly \$250,000?

A. That was my recollection.

Q. Didn't you hear discussion that he owed Mid-States thirty thousand?

A. No, I don't recall that.

Q. And owed other miscellaneous companies thirty thousand?

A. I don't recall.

(Testimony of Samuel R. Feller.)

Q. Is it your testimony you don't recall discussion about what Lotz owed other people?

A. I have given the best of my recollection. [904]

Q. And you don't recall any reference to Lotz' obligations to others? A. No, sir.

Mr. Garrison: That is all.

The Court: Take a recess.

(Short recess.)

(Witness excused.)

Mr. McKinnon: Call Mr. Marks, please.

ALFRED R. MARKS

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: State your full name and your occupation to the Court.

The Witness: My name is Alfred R. Marks. I am a certified public accountant.

Mr. McKinnon: If the Court please, in interrogating this witness I am going to refer to and offer in evidence certain schedules in the order in which these I have in my hand appear. If Your Honor would like, I would be happy to hand these up to Your Honor as copies for Your Honor's reference while we go through the examination. [905]

And may I say, if the Court please, in fairness to Counsel and for their convenience, that I would be happy to permit an interval between the discussion—between direct and cross examination to enable their accountant to examine the schedules

(Testimony of Alfred R. Marks.)

and confer with counsel prior to the time they have to cross examine this witness.

Direct Examination

Mr. McKinnon: Q. Your name, please?

A. My name is Alfred R. Marks.

Q. Where do you reside?

A. I reside in Malverne, New York.

Q. Your occupation?

A. I am a certified public accountant.

Q. How long have you been a certified public accountant?

A. I was certified by the State of New York in April, 1932.

Q. Please describe your career since that time, the commissions you have held, and so on?

A. Since 1932?

Mr. Garrison: We will stipulate to his qualifications. He is a certified public accountant.

Mr. McKinnon: I would like him briefly, nevertheless, to review his career.

The Witness: Since 1929 I have been in public accounting continuously except for two intervals of about one year each at which time I was an executive of a corporation, and during [906] that period I started as a junior accountant and went through and became a partner of my own firm.

Mr. McKinnon: Q. What is that firm?

A. Ferro Berdon and Company.

Q. Where are they located?

A. 39 Broadway in New York.

(Testimony of Alfred R. Marks.)

Q. You are a partner in the firm?

A. Yes, I have been a partner in the firm since 1947.

Q. Have you had a special experience in insurance accounting?

A. Yes, almost from the inception of my connection with Ferro Berdon. I have had a great deal of extensive experience in insurance accounting from the viewpoints of companies, agency brokerage firms, and so on.

Q. Have you examined the books of Mid-States Insurance Company in reference to the Lotz Agency?

A. Yes. An examination was made under my supervision at the home office of Mid-States Insurance Company in Chicago, with specific reference only to the account of the Joe Lotz Agency.

Q. Well, what aspect of the books did you examine?

A. I examined the—the examination was conducted primarily to substantiate the figures contained in the claim prepared by the attorneys for Mid-States, a claim against American Fidelity and American Plan, and in connection with the [907] examination I examined the agency account maintained in the books of that Company with Joseph Lotz, and examined to some degree supporting information to satisfy ourselves with respect to the entries contained in such account.

Q. Did you also examine the books of the Joe Lotz Agency?

(Testimony of Alfred R. Marks.)

A. Yes. An examination was made under my supervision of such books of the Joe Lotz Insurance Agency as were made available to us. They started with the date of June 1st, 1949, and they went—I believe it was posted through November, 1951.

Q. Were there other books prior to June, 1949?

A. We could determine none. In the course of my examination I made an inquiry from Joe Lotz' former accountant, a Mr. Green, in Oakland, to determine whether there were any books which I should see, and he stated to me that it was his recollection that there were no sets of general books that normally would be found in an agency for the period prior to 1949.

Q. Have you also examined the report of Lester, Herrick & Herrick, dated January 21st, 1953, which I believe is in evidence here?

A. I—yes, I have made a review of that report.

Q. Now, Mr. Marks——

Mr. McKinnon: I am referring, Your Honor and Gentlemen, to the two-page schedule entitled "Schedule 2."

Mr. McKinnon: Q. I will ask you, Mr. Marks, if you at my request made a comparison of the cash position of the [908] Joe Lotz Agency vs. Premiums payable to companies from May, 1949, to December 1950? A. Yes, I have.

Q. I will show you the two-page document I have referred to, which is entitled "Comparison of Cash Position versus Premiums Payable to Com-

(Testimony of Alfred R. Marks.)

panies", and in the upper right-hand corner, "Schedule 2, Page 1.", and then there is a Page 2.

I show you that document and ask you if that was prepared by you or under your supervision?

A. It was.

Mr. Garrison: Your Honor, we will object to the use of any figures dealing with the periods 1949 and 1950 on the ground that they are totally incompetent, irrelevant and immaterial to any issues in this case.

This refers to our previous discussion on the same subject, Your Honor. This litigation involves a charge of fraud committed in the year 1951, by a Company who only did business with Mr. Lotz in that year, at a time when we were operating under a contract that was entered into September of that year.

It is our contention and the basis of my present objection that what might have been done prior to 1951, can't possibly shed any light upon whether or not Mr. Hart and his associates committed acts in 1951, at a time when we were operating under the contract, which constituted fraud, and [909] particularly whether or not they received premium funds which were owned and belonged to Mid-States Insurance Company on business written in 1951.

Mr. McKinnon: Will Your Honor hear my response to the objection?

The response is simply that, as we have indicated before, one of the defenses which we offer

(Testimony of Alfred R. Marks.)

in this case is that the fund, the monies in the so-called trust account, represented actual dealer obligations from Lotz to the Company; and that to establish that, we offer evidence showing a course of dealing which discloses that there was invasion, including 1951, of the funds of the Mid-States Insurance Company by this agent, which invasion of course would be inconsistent with a trust relationship.

Your Honor will recall that there has been testimony here which has been submitted, I believe, most of it, without objection, relating to the so-called float that was going back to the inception of the Agency of Joe Lotz with Mid-States, to the effect that he was using funds, premium monies, of the companys to pay sub-agents' commissions and operating expenses. This schedule tends to confirm—it does confirm the invasion by Lotz of Mid-States money for the period which I have described. It is therefore a part of the course of dealing and is a part of our defense, which is one of the major defenses in this entire litigation. If this evidence were [910] excluded, the Court would deprive itself of facts and figures taken from the books which confirm the oral testimony that has been introduced.

Mr. Garrison: Your Honor, I do not desire to belabor the objection, but I would like to make this one short observation to further explain our position:

The theory of this litigation is, quite aside from the question of the character of the funds involved,

(Testimony of Alfred R. Marks.)

and quite aside from whether or not there was or was not a dealer-creditor relation, that Mr. Lotz was an agent. And as our District Court of Appeals says, it is Hornbook Law that an agent has certain obligations to his principal. Among those are fair dealing and fair disclosure and honesty.

In this case it is our contention that Mr. Lotz violated that agency obligation. He did not treat us fairly. He did not make a full disclosure or a fair description.

I think it is fundamental, elementary law that whenever anyone else joins with an agent in his breach of his obligations, that person, whether he profits or whether he does not profit, becomes likewise liable for any damages that result from the agent's dereliction.

So that our contention in this litigation is that it makes no difference whatever whether the funds, or relationship of debtor creditor, or fiduciary, or trust fund, the fact is what the relations are. He had the agent's obligations [911] to treat it as I have mentioned, and if anyone else participates with him in the breach, they, like he, become responsible.

Mr. McKinnon: If Your Honor please, Mr. Garrison is now arguing the case. I am perfectly prepared to respond to a legal argument at this time, if Your Honor wishes. But Mr. Garrison is saying that these were trust funds, and this is conspiracy, and that is the end of the case.

That's fine for the plaintiff's presentation, but it

(Testimony of Alfred R. Marks.)

completely eliminates our position in this matter; which is, according to the cases we cited in our trial memorandum, this: that when an agent is permitted to use funds which would otherwise be trust funds, for his own purposes, in the manner in which this agent did here, the obligations because changed from trustee and debtor.

This evidence bears directly on that point. Mr. Garrison would simply exclude all the evidence tending to support our defense.

The Court: The objection is overruled.

Mr. Garrison: May the same objection go to the other offers dealing with the same period?

The Court: It may.

Mr. Garrison: And may it go in subject to motion to strike?

The Court: You may have a running objection and motion to strike. [912]

Mr. Garrison: Thank you.

Mr. McKinnon: I offer this document in evidence.

(Whereupon, document entitled "Schedule 2," was admitted into evidence and marked as Defendant's Exhibit J.)

Mr. McKinnon: Q. Now, Mr. Marks, showing you this Defendant's Exhibit J, I will ask you to explain the significance of it to His Honor, if you will. I would ask you to limit your comments to three or four items rather than going through them all. Let's take May, 1949—June, 1949, and any

(Testimony of Alfred R. Marks.)

months subsequent thereto, and add your explanatory comments, will you, please.

A. Yes, sir.

This Schedule is one which purports to show a comparison of the cash position of the Joe Lotz Agency at the end of each of the months during the period from May, 1949, through December 1950, comparing such figures with the amount of liabilities that the Joe Lotz Agency had to the companies it represented as at the same dates.

In other words, the second column of this schedule shows an amount of cash available, including operating and petty cash.

In other words, all cash of the Agency.

The first column shows only the amount of trustee account cash included in the second column. [913]

The third column shows the amount of the premiums payable to all companies as reflected by the general ledger of the Joe Lotz Agency.

The next column, "Deficiency of Cash", shows the amount, or shows the extent to which there was insufficient cash from all sources to equal or balance the amount of premiums payable to the companies represented by the Joe Lotz Agency at the end of each of the months.

The remaining columns here show the amount of the Mid-States balance alone included in the third column; in other words, the amount of the amount due Mid-States which is included in the column labelled "Premiums Payable to All Companies".

Q. Mr. Marks, if we take that first month, the

(Testimony of Alfred R. Marks.)

first line, May, 1949, shows \$24,554.64 as the total cash. The next column, third column from the left, shows total premiums payable \$25,942.51.

The first column shows that as of that month there was a deficiency of cash of \$1,387.87 in the Lotz Agency to compare with the total premiums payable, is that correct?

A. That is correct.

Q. In the second line, June, 1949, it shows on the contrary that there was an excess of cash, as noted by the parenthetical figure in the first column, of \$6,863.13, is that correct?

A. That is correct.

Q. As we go down the line, we see that the figures—none of [914] the remaining figures are in brackets. Therefore, as I understand it, there was a deficiency of cash in the amount mentioned in the first column, beginning with August, 1949 and running down to December, 1950, in the amounts shown, is that correct?

A. That is correct.

Q. In other words, if you go to the second page, you see that that deficiency had reached a figure as high as \$40,554.36 in November, 1950; and in the last item \$28,362.15 in December of 1950?

Then from this schedule, Mr. Marks, can you say that in only one month in the period of May, 1949 to December, 1950 was there enough cash in the Joe Lotz Agency to pay the premiums to all companies?

A. At the end of each of the months contained

(Testimony of Alfred R. Marks.)

in this schedule there is only one month in which there was a sufficient amount of cash to equal the liabilities to the companies.

Q. Very well. Now, Mr. Marks, there has been testimony in this trial concerning the question of whether or not Mr. Lotz was current in his payments of premiums to the companies.

Since that term "current" has been given various meanings, one of those meanings, in the opinion of Mr. Hatfield, being synonymous with "delinquent", I believe the term "delinquent" and I will ask the question whether the records show that Mr. Lotz from the beginning of his agency with Mid-States, or at [915] least from July, 1947, down to November, 1951, remitted his premiums to Mid-States on time, on the due dates, or not? Did you make such an examination?

A. In connection with our examination of the records of Mid-States' dealings with the Lotz Agency, and from information contained in the agency account, contained in the Mid-States books, dealing with the Lotz Agency, we made a comparison with the dates settlements were received as compared with the requirements under the contract.

Q. Very well. Now, I show you Schedule 3, one page, "Joe Lotz Agency, Beginning of Premium Payments to Mid-States (per Mid-States records) Schedule 3, and I ask if that schedule was prepared by you? A. Yes, it was.

Mr. McKinnon: I offer this in evidence, Your Honor.

(Testimony of Alfred R. Marks.)

The Court: It may be admitted next in order.

(Whereupon document, Schedule 3 above, was received in evidence and marked Defendant's Exhibit K.)

Mr. McKinnon: Q. Now, Mr. Marks, will you kindly explain the schedule in brief to his Honor?

A. This schedule breaks down the period covered into three categories, measuring by the credit period contained in the contracts in force during the period. In other words, from May, 1947, until April, 1951, the agency operated under an agreement with Mid-States providing that settlement must be made [916] within twenty-five days after the end of the month in which the business was written.

On May 1st, 1951, the contract was changed to increase the credit period from twenty-five days to seventy-five days. Then on September 1, 1951, a new contract was entered into which provided for a sixty-day credit period.

Now, extending from the left to the right hand side of the page, this schedule shows a classification of the number of settlements paid within certain categories, and I have broken it down to show in the first column those accounts which were paid within five days after the date they were due, and those which were paid from six to thirty days late, those which were paid thirty to sixty days late, those paid over sixty days late, and the accounts which were unpaid.

(Testimony of Alfred R. Marks.)

You will note as you follow down the page, Your Honor, that under the twenty-five day credit period the first settlement of the May, 1947, account would be due in July, 1947. And from July to December, 1947, a period of six months, every account was paid within five days after the due date.

In the year 1948, of the twelve monthly payments three payments were made within five days after the due date, nine payments were paid some six to thirty days late.

In the year 1949, of the twelve months, five were paid within five days after the due date, seven were paid from six to thirty days late. [917]

For the year 1950, no payments were made within five days after the due date. Three payments were made within sixty days late—correction, three payments were made within six to thirty days late. Nine payments were made thirty to sixty days late.

From January to April of 1951, a period of four months remaining under the first contract, of the four payments, three were paid thirty to sixty days late and one was paid over sixty days late.

At that point the contract changed to a seventy-five day credit period, and on the basis of such new terms it operated only under that contract for a period of four months. During that period of four months two payments were made within five days after the due date, one was paid six to thirty days late, one was paid thirty to sixty days late.

(Testimony of Alfred R. Marks.)

Under the new contract which called for—effective September 1st, 1951, which called for a sixty-day credit period, no settlements were actually made under such contract.

Q. Now, another point in issue in this case, a point on which there has been testimony, is the rate of loss ratio of the Mid-States business written through the Joe Lotz Agency from September 1, 1951 and onward and later, compared with the loss ratio prior to September 1, 1951.

I will ask you if you prepared a schedule of loss ratio on this business from September 1, 1951, through December 31, [918] 1953? Please, just answer whether you did. A. Yes, I did.

Q. Now, I show you a one page document entitled, “Joe Lotz Agency, Cumulative Totals of Earned Premiums and Loss Ratio on Mid-States Business, September 1, 1951, through December 31st, 1953”, and also entitled “Schedule 6”, and I will ask you if that was prepared by you?

A. Yes, it was.

Mr. McKinnon: I offer this in evidence, if the Court please.

The Court: It may be admitted and marked next in order.

(Whereupon document, Schedule 6, above, was received in evidence and marked Defendant's Exhibit L.)

Mr. McKinnon: Q. Now, Mr. Marks, I will leave it to you to explain this schedule to his Honor.

(Testimony of Alfred R. Marks.)

Mr. Garrison: Just a moment before you go on. Was Schedule 6 taken from Lotz' books?

Mr. McKinnon: Q. Mr. Marks, Mr. Garrison has asked from which books these were taken, Mid-States or Lotz?

A. They were taken from information obtained from Mid-States books.

Mr. Garrison: Thank you.

The Witness: A. Furnished by the Mid-States people.

Mr. McKinnon: Q. Now, if you will kindly contract your explanation to something less than the schedule and figures and [919] get to the essence, I am sure his Honor and all will be indebted to you.

A. This schedule shows monthly results of the operation of the business of the Joe Lotz Agency with Mid-States Insurance Company. It is a columnar schedule showing statistics as follows:

Earned Premiums for the month and on a cumulative basis. Commissions earned by Lotz on a monthly and cumulative basis. The percentage of commissions to earned premiums for each month and on a cumulative basis.

Amount of losses and adjustments incurred in each month and on a cumulative basis. And the percentage of losses and adjustments incurred to earned premiums on a monthly and cumulative basis.

And also another figure for each month under operation of the new agreement, which went into effect on September 1st, 1951, but is a combined

(Testimony of Alfred R. Marks.)

schedule of the results of the operations on the run-off on the old contract as well as on the new contract.

The earned premiums, Your Honor, are the portion of the premiums that, on a pro rated basis, are earned in a particular month. It is measured by a formula, for the most part, prescribed by insurance regulations.

The losses and loss adjustments incurred are on the basis of losses actually reported to the company as having been [920] incurred during that particular period.

This schedule shows with respect to the loss ratio that for the period from September 1951, through December 31st, 1953, which just about exhausted the unearned premium reserve, and at this point outstanding losses had been reduced to, I think, eight or nine cases, for this period the loss ratio was 71.08 per cent on both contracts, excluding the month of September, 1930, on the old contract.

Q. 1930?

A. I mean 1951. September, 1951, on the old contract. The loss ratio for that period is 68.51%

Q. Now, did you also make a computation of the loss ratio of Mid-States under the Joe Lotz Agency for the period January 1, 1951, through August 31, 1951?

A. Yes, I have.

Q. I show you a one page document entitled, "Joe Lotz Agency, Cumulative Totals of Earned Premiums and Loss Ratios on Mid-States Business, January 1, 1951, through August 31st, 1951", and

(Testimony of Alfred R. Marks.)

also entitled, "Schedule 7", and ask you if you prepared that schedule? A. Yes, I did.

Mr. McKinnon: I offer this in evidence, if the Court please.

The Court: It may be admitted and marked.

(Whereupon document, Schedule 7, above, was received in evidence and marked Defendant's Exhibit M.) [921]

Mr. McKinnon: Q. Now, before explaining this to his Honor I will ask you again to refer to the period—Well, it acts as of the close of each month, doesn't it, Mr. Marks?

A. That is right.

Q. January 31st—

A. I see your point.

Q. It runs from January 1, 1951, through August 31 of the same year? A. That is right.

Q. The period having been chosen because that's the period, approximately, in which Mr. Lotz acted as the agent for both Mid-States and American Fidelity, correct? A. That's right.

Q. With that, will you kindly explain that schedule, briefly, to his Honor?

A. This schedule contains information again prepared from basic information furnished from Mid-States from their Chicago records, and the form and substance are the same as in Schedule 6, or the previous exhibit, and covers the period from January 1, 1951, through August 31, 1951.

It shows the information by the month contained

(Testimony of Alfred R. Marks.)

in that period—for the months contained in that period, and on a cumulative basis.

The loss ratio for the period on a cumulative basis, was 64.65% [922]

Q. If I calculated correctly, then, it is true to say, then, that the loss ratio for the period from September 1, 1951, and onward was only 3.86 higher than the loss ratio for the months of January to August, 1951, is that right?

A. That's right.

Q. I will now ask you if you computed the loss ratio of American Fidelity on its business written through the Lotz Agency from December, 1950, to February, 1954? A. Yes, I have.

Q. I show you a schedule entitled, "Joe Lotz Agency, Cumulative Totals of Earned Premiums and Loss Ratios on American Fidelity business, December, 1950 to February, 1954, Schedule 8", and I will ask you if you prepared that schedule?

A. Yes, I did.

Mr. McKinnon: I offer this in evidence, if the Court please.

The Court: It may be admitted and marked.

(Whereupon document, Schedule 8, above, was received in evidence and marked Defendant's Exhibit N.)

Mr. McKinnon: Q. Will you please give a brief summary or explanation of this schedule to the Court?

A. This schedule shows information similar to that commented upon and described in the previous

(Testimony of Alfred R. Marks.)

two exhibits, but it is related to the business of the Joe Lotz Agency written on behalf of American Fidelity and Casualty Company, and was based upon [923] information contained in American Plan Corporation records.

The setup of this schedule, is identical with the schedules previously commented on for Mid-States business, and shows in the same form for the months contained in the period from December, 1950, which was the inception of the business written by Lotz for American Fidelity, through the period February, 1954, at which time the last transactions on the American Fidelity business had run off.

It shows that for that period the loss ratio on the business was 79.51%.

Q. Now, earlier in the trial, I believe at the outset, Mr. Marks, we indicated to his Honor—I think in our trial memorandum—that the loss ratio of American Fidelity was around 100%. That was erroneous?

A. That was erroneous.

Q. Is that right? A. Yes.

Q. In other words, a recapitulation—or re-computation of business has brought out your figure of seventy-nine and a fraction?

A. That is right.

Q. Rather than 100%?

A. That is right.

Q. We were in error in our first estimate. I believe one of the reasons was, was it not, that the computation hadn't been [924] brought down to date, shows there as of an earlier figure?

(Testimony of Alfred R. Marks.)

A. That is right.

Q. Which probably explains it.

Mr. McKinnon: Now, if the Court please, I come to the schedule in your hand, which is called Schedule 9, which I have to beg the Court's indulgence on a little bit, because this has a little complication in it, and I hope it won't be too tedious.

Mr. McKinnon: Q. I asked you, did I not, Mr. Marks, to prepare a schedule containing essentially the following:

First, the net premium funds collected by Lotz on the American Fidelity policies after commissions to sub-agents had been subtracted;

Secondly, to compute his total income from commissions, or all other sources, and whether cash or credit.

By the way, I should have said for the period December, 1950, to November, 1951, with reference to both of those items.

Thirdly, for the same period, to compute the fair allocation, what you would be prepared to say and demonstrate is a fair allocation of the operating expenses of the Lotz Agency for that period to the American Fidelity operations;

And, finally, to compute the funds remitted by the Lotz Agency to the American Fidelity during that period of time;

The object, expressed rather generally, being to compare the total of the premium and other income monies that he had— [925] pardon me—premium monies on American Fidelity policies and Lotz'

(Testimony of Alfred R. Marks.)

other income from all sources, less the operating expenses attributable to American Fidelity, with the amount remitted to American Fidelity during the period.

Do you recall my asking you to make those computations? A. Yes.

Q. Did you do so? A. Yes, I did.

Q. I show you a document titled, "Joe Lotz Agency, Computation of Funds Exclusive of Mid-States Premiums Available for Settlement of Account with American Fidelity and Casualty Company, December, 1950, to November, 1951, Schedule 9", pages 1, 2 and 3; and I believe page 1 contains the data in summary, and pages 2 and 3 are supplemental sheets supporting certain data on page 1, is that correct? A. That is correct.

Mr. McKinnon: And let me say for counsel's purposes that the accountant has prepared the figures as asked and we will not quarrel with any of the titles of any of the columns. We will ask the accountant to give us the explanation of these figures and the legal argument that will follow therefrom will, I am sure, be submitted by you. I don't want to require the accountant to be a lawyer as well as a member of his own profession.

Mr. McKinnon: Q. Now, Mr. Marks, is this sheet that I [926] have just described prepared by you? A. Yes, it is.

Mr. McKinnon: I offer this in evidence, if the Court please.

(Testimony of Alfred R. Marks.)

The Court: It may be admitted and marked next in order.

(Whereupon document, Schedule 9, above, was received in evidence and marked Defendant's Exhibit O.)

Mr. McKinnon: Q. Now, Mr. Marks, will you give a summary, an explanation, of this schedule to his Honor? I believe you can confine your comments to page 1, because the other two pages are actually supplemental documents.

The first column is entitled, "Net Premium Funds Collected by Lotz on A. F. and C. policies After Commissions to Sub-Agents".

I take it that that means that you subtracted from the gross premium the amount of the sub-agent's commissions, and you set forth in column 1 the net remittance of the premium after that subtraction, is that correct?

A. Well, that subtraction, actually, of the commission was done by the sub-agents in remitting to the Joe Lotz Agency, and therefore, he remitted the gross premiums less the amount of the sub-agent's commissions, so that the net check received by the Joe Lotz Agency represented the actual cash received to be deposited in this trustee account.

Q. I see.

A. And the figures contained in the first column are the [927] summary and tabulation of such remittances by the agents.

(Testimony of Alfred R. Marks.)

Q. And they total for the period indicated \$225,-914.00?

A. That is right. Now, I would like to make clear, Mr. McKinnon, that this information was based upon information contained in the report prepared on the Lotz Agency account for the December, 1950 period through November, 1951, by Lester, Herrick & Herrick, public accountants, whose services were employed by Mid-States, and that the figures contained in here are reconcilable to those figures contained in that report. We have not made an independent examination of the figures.

Q. Does that comment apply to the entire schedule or only to column 1?

A. It applies, wherever possible to wherever the figures could be reconciled with the Lester, Herrick & Herrick report, and such reconciliations are footnoted on the bottom of the schedule.

Q. I see. Going to the second column, which is entitled "Commissions and Other Income from all Sources, Cash or Credit", and it totals for the period \$111,133.00. Please explain that?

A. This is a tabulation which is supported—the column on page 1 is supported by page 2 of this schedule, which shows the detail used to reconcile these figures. And just a quick reference to page 2 of this schedule will show that the amount of \$111,-133.00 contained in the second column on page 1 consists of or comprises commissions earned by the Joe Lotz Agency from [928] Mid-States Insurance Company, all of which were paid in cash to Joe

(Testimony of Alfred R. Marks.)

Lotz during the period December, 1950, to November, 1951, totalling \$54,955.00.

And it includes, also, commissions from American Fidelity and Casualty totalling \$30,032.00, of which \$8,036.00 was actually received in cash by the Joe Lotz Agency from American Fidelity and Casualty Company, and \$22,006.00 was credited to Joe Lotz' account with the American Fidelity and Casualty Company in reduction of the amounts due from Joe Lotz.

Other items included in the total of \$111,133.00 includes commissions received by cash or by credit from other companies, companies represented by Joe Lotz other than Mid-States or American Fidelity, totalling \$21,028.00, and cash—income cash from miscellaneous sources, including some life insurance commissions, and so on, of \$5,106.00, and the total is \$111,133.00.

Q. When credits occurred, I suppose the credits were made to the trustee account of Lotz, is that correct?

A. That is right.

Q. Now, your third column is entitled, "Total Funds Available to Cover American Fidelity and Casualty Company Operations Cumulative". Will you explain that briefly, please?

A. Yes. This column is a total of the opening balance in the preceding month, which would be reflected in the fifth column of this schedule, plus the first two columns, to show the amount [929] of

(Testimony of Alfred R. Marks.)

funds carried forward from the preceding month, plus the premium funds collected by Lotz on the A. F. and C. policies, plus commissions and other income from all sources.

Q. Now, explain the first column, please, regarding operating expenses?

A. The first column reflects the monthly total of the portion of the operating expenses and drawings made by Joe Lotz, which we believe are properly and fairly allocable to the American Fidelity and Casualty Company operations performed by Joe Lotz.

This first column is supported by analysis of the schedule contained on page 3 of schedule 9. And the amount, the total amount of the portion of the operating expenses and drawings allocable to the A. F. and C. operations of the Joe Lotz Agency are \$47,669.00.

A quick reference to schedule 9, page 3, shows the method used by us to allocate the total operating expenses and the drawings of Joe Lotz between the operations of Mid-States, American Fidelity and Casualty Company, and other companies.

Q. Why did you take cash volume for the first three or four months and the number of transactions for the remaining months?

A. There was a change in the bookkeeping methods of the Joe Lotz Agency effective April, 1951, when the agency was placed on a machine accounting basis in April, 1951.

(Testimony of Alfred R. Marks.)

From that point on they could—they did maintain records [930] on bookkeeping machines, which enabled us to determine the number of transactions entered into in each of the months.

Mr. McKinnon: I believe his Honor would like to interrupt now. Is that your desire, Your Honor?

The Court: Is it agreeable to you, counsel?

Mr. Garrison: Very agreeable, Your Honor.

The Court: Recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [931]

ALFRED R. MARKS

called as a witness for the defendants, having been previously sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as hereinafter indicated:

Direct Examination—(Continued)

Mr. McKinnon: Q. Just before the noon recess, Mr. Marks you had reached the point in reference to Schedule 9 which summarizes in the column third from the last the cumulative amount of the premiums and commissions, less operating expenses by month in the Lotz Agency, referring for the purpose of this exhibit to American Fidelity and Casualty Company business, and you were about to conclude your explanation by reference to the last two columns.

(Testimony of Alfred R. Marks.)

Will you now proceed? You can start with the column next but last, if you wish.

A. Oh, I see.

Q. What does that represent?

A. The column, second from the last, on page 1 of Schedule 9 shows the amount of monies remitted to American Fidelity and Casualty Company by Lotz' and by Lotz' sub-agents, and the remittances of the amounts that were reflected either in Lotz' books or which went to the American Fidelity and Casualty Company, [932] bypassing Lotz' books, to the extent of about \$34,000.00.

Q. And the last column?

A. The last column shows an accumulation of the monthly balances progressively from December, 1950, down to November, 1951.

Q. Then, if I may summarize—listen, will you, and see if this is correct:

The net premiums on American Fidelity business, after deducting commissions to sub-agents, total for the period \$225,914.00. Total income, whether from commissions or otherwise, and whether cash or credit for the period total \$113,133.00.

A. \$111,000.

Q. Pardon me, \$111,133.00. If we add those two figures together they make \$337,047.00. If you subtract from that the operating expenses which you allocate to American Fidelity and Casualty Company of \$47,669.00, you get a remittance of \$289,378.00. And that is \$23,467.00 more than was re-

(Testimony of Alfred R. Marks.)

mitted to the American Fidelity and Casualty Company on its business.

A. That is right.

Q. Now, I have one more schedule.

Mr. McKinnon: I say, Your Honor, I have one more schedule which I would like to show to the witness.

Mr. McKinnon: Q. We asked you to compute, Mr. Marks, the state of the Lotz Agency account with the American Fidelity [933] and Casualty Company as of the latest date, March 31st, 1954, the purpose being to show whether or not he had overpaid American Fidelity.

For that purpose I show you a document called "American Fidelity and Casualty Company account with Joe Lotz Agency, Statement of Account January 1, 1951, to March 31, 1954", and entitled "Schedule 12", and containing pages 2 and 3, the first page of which has been removed because we found it irrelevant to our purposes, and I ask you if you prepared those two sheets?

A. Yes, I did.

Mr. McKinnon: Thank you. I offer this Schedule in evidence, if the Court please.

The Court: It may be admitted and marked next in order.

(Whereupon document, Schedule 12, above, was received in evidence and marked Defendant's Exhibit P.)

(Testimony of Alfred R. Marks.)

Mr. McKinnon: Q. Will you please explain that schedule to the Court, Mr. Marks?

A. This page 2 of schedule 12 is the accounting for premiums written by the Joe Lotz Agency with the American Fidelity and Casualty Company for the period January 1, 1951 through March 31, 1954.

It breaks the account into two segments, the first segment being for the period January 1, 1951, to October 31, 1951, at which point the account was balanced by the cancellations of [934] \$61,000.00—balanced approximately—and from November 1, 1951, to March 31, 1954, showing subsequent cancellations and cash payments made on account of such cancellations.

The net of all the transactions referred to in this schedule show a balance in favor of American Fidelity and Casualty Company for premiums as of March 31, 1954, in the amount of \$840.50.

The second page of this schedule shows details of the net cash disbursed by American Fidelity and Casualty Company for the account of Joe Lotz during the secondary period referred to.

Q. Now, Mr. Marks, I wish you very briefly to summarize the schedule and I will ask you if this summarization is correct:

First, that from May, 1949, to December, 1950, there was in every month except one month a deficiency of cash in the Lotz Agency in comparison with the amounts of premiums owing to all companies; the deficiency running from \$1,387.00 in

(Testimony of Alfred R. Marks.)

May, 1949 to as high as \$40,554.00 in November, 1950.

Mr. Garrison: If the Court please——

Mr. McKinnon: Just a moment, until I finish the question. You may make your objection when I finish the question, please.

Mr. McKinnon: Q. (Continued) Thus showing that there must have been—is that right, Mr. Marks? —That there must have been an invasion of the premiums of these companies during the period mentioned, by Mr. Lotz for operations of [935] sub-agents, or other persons?

Mr. Garrison: If the Court please, Mr. Marks has told us what the exhibits show. The exhibit speaks for itself and it seems to me an argument at this point by counsel is unnecessary, and the questions have all been asked and answered, and if there is any further clarification, I think Mr. Marks should do it and not counsel.

The Court: Could you break down that question so I follow you?

Mr. McKinnon: Your Honor, if you would like me to reframe it, I will make it more brief, if the Court please.

Mr. McKinnon: Q. Is this a correct summarization of Schedule 2, Mr. Marks: That in every month except one from May, 1949 to December, 1950, there was a deficiency of cash in the Lotz Agency in comparison with the amount of Premiums payable to all companies?

(Testimony of Alfred R. Marks.)

Mr. Garrison: Objected to on the ground that it has been asked and answered, and the exhibit speaks for itself.

The Court: The objection will be overruled.

A. Except for the month of June, 1949, the other months, month ends, show a deficiency of cash.

Mr. McKinnon: Q. Well, can one draw the conclusion from that the premium monies of these companies in the Lotz Agency have been invaded by Mr. Lotz?

A. I think that is a fair conclusion. [936]

Q. Now, with reference to the period within which he paid his premiums to companies, is it a fair summary of Schedule 3 to say that there is no case, no money in the entire period from July, 1947, to the end of the period covered by the schedule, in which he made his payment on the due date?

Mr. Garrison: Objected to on the ground that it has been asked and answered. The witness gave us this discussion of this exhibit in considerable detail, and it is now repetitious and argumentative, for the purpose of rehashing the same testimony on the same exhibit.

Mr. McKinnon: My purpose, if the Court please, is to try to reduce the complexity of these figures into a portrait that can be put in four or five questions. It seems to me it is more manageable to summarize them in this way. I, naturally, leave it to Your Honor's pleasure.

(Testimony of Alfred R. Marks.)

The Court: The objection will be overruled. You may use the same latitude in cross examination.

The Witness: May I please have a repetition of that question?

Mr. McKinnon: Q. I will repeat the question, then: Does not Schedule 3, prepared by you, not show that none of the payments due from the Lotz Agency to Mid-States during the period mentioned was made on the date specified in the contract?

A. Except for the first column where the date of receipt was within the five day period of the due date, all other months, [937] all other accounts, were to some degree late.

Q. Very well. And that in 1948 in nine months they were six to thirty days late; in 1949, in seven months he was six to thirty days late; and in 1950 in nine months he was thirty to sixty days late, is that correct?

A. That is correct.

Q. Is it a fair statement to say that the loss ratio on the business of Mid-States in the Lotz Agency on September 1st and following—1951, of course—was 68.51%, and that prior thereto it was 64.65%, a difference of only 3.86% after September 1, compared with before?

A. That is right.

Q. And is it a fair statement to say that the loss ratio on the American Fidelity business was 79.51% from the beginning to the end?

(Testimony of Alfred R. Marks.)

A. From December, 1950, to the end of the run-off in February, 1954.

Mr. McKinnon: And I will not now labor the Court with summarizing schedule 9, which we have just covered, which shows that the total payments to American Fidelity and Casualty Company were less than the premiums of American Fidelity and Casualty Company, and there was income from all sources, after taking away the operating expense applicable to the American Fidelity Company.

Mr. McKinnon: Q. Finally, there is a present balance due from Lotz to American Fidelity of \$840.50? [938] A. That is right.

Mr. McKinnon: Now, I have only a very few more figures, Your Honor, in my re-computations.

Mr. McKinnon: Q. Mr. Marks, have you computed the percentage of sub-agents' commissions to Mid-States and American Fidelity business from January 1, 1951 to November 31, 1951?

A. Did you say American Fidelity?

Q. Well, first let's take Mid-States business.

A. Oh.

Q. Percentage of sub-agents' commissions in Mid-States business for that period in the Lotz Agency.

A. Percentage of commissions allowed to sub-agents during the eleven months ended November 30, 1951, on account of Mid-States business was approximately 26%.

(Testimony of Alfred R. Marks.)

Q. And in the American Fidelity?

A. In the American Fidelity for the same period, approximately 23%.

Q. And on all companies?

A. And on all companies represented, approximately 26.7%.

Q. And have you the percentage of operating expenses to the business of all companies from January to August, 1951?

A. For the period from January to August, 1951, the percentage of operating expenses and drawings by Joe Lotz against writings of premiums was 15.4%. [939]

Q. The total of sub-agents' commissions and operating expenses, then, amounts to 42.1% on all companies, do they not? A. That is right.

Q. I think Mr. Lotz had two bank accounts, did he not, Mr. Marks?

A. Well, he had two types of accounts, a trustee account and an operating account.

Q. What went into the trustee account? What type of money? I don't mean how.

A. The type of money that went into the trustee account were premiums collected from sub-agents, salvage and subrogation, transfers from the operating account, miscellaneous items, and I guess that just about generally covers it.

Q. When premiums went into that account,

(Testimony of Alfred R. Marks.)

would they go in less sub-agents commissions or with sub-agents commissions?

A. I would say that in substantially all cases the agent deducted the commission for the amount he remitted to the company, and therefore the amount that they would deposit in the trustee account would be the amount net of the commission.

Q. In some cases was it a gross premium?

A. In some cases there was a gross premium.

Q. In that case what did he do?

A. In that case he would have to draw a check on his trustee account to pay the commission to the broker.

Q. For what other purpose would he draw on the trustee account? [940]

A. Well, he drew on the trustee account to make payments on account of his obligations to the companies he represented. He made premium refunds to the sub-agents and/or assured, and he made transfers to the operating account.

Q. For what purpose would he draw on the operating account, what type of transaction?

A. From the operating account he would draw—he would draw on the operating account to cover his normal operating expenses and to cover his drawings and living and personal expenses, and also out of that account he would make, when necessary, transfers to the trustee account, back to the trustee account.

Q. He would transfer from the operating ac-

(Testimony of Alfred R. Marks.)

count back into the trustee account, is that right?

A. That is correct.

Q. How were his earned commissions handled?

A. Earned commissions were usually deposited in the operating account.

Q. Did he ever place any of his own capital in the agency, so far as you can say?

A. Well, from during—bearing in mind that the only business available to us goes back to 1949, I would say from that period, from 1949 to date, there were some borrowings that he made and the proceeds of which he put into his fund. Some of those went into the operating account, some into the trustee account. He also made repayments out of his funds in settlement of such [941] obligations.

Q. Now, you say some of his commissions were paid by check and by credit, is that correct?

A. Commissions he received?

Q. Commissions he received from the companies he represented. How did he receive them, go back to that?

A. Well, he would get monthly settlements from the companies he represented in most cases, and they would be in the form of a check which would be deposited in his income account.

However, there were certain periods when the companies did not remit the commissions to him and used those commissions as a reduction of the amount of liability that he owed to the company, and it would therefore be credited against his account.

(Testimony of Alfred R. Marks.)

Q. Trustee account?

A. Well, of course, on their books it would be an account to the agent, which would be the trustee account, the account for trustee funds.

Q. Now, in view of the status of these accounts as you have described them, could one distinguish at any time what money in the trustee account belonged to what company and what money belonged to another?

A. No, it would be impossible to determine or segregate the balance in the trustee account as to how much was in there to the credit of each company.

Q. Now, yesterday, when Mr. Garrison was interrogating Mr. Hart [942] he produced a tape of some payments totalling \$144,698.00, which appeared to have been paid on account of the roughly \$240,000.00 owing to the American Fidelity by September 14th, the date of a teletype in which Mr. Hart was demanding \$190,000.00 roughly as the balance of the payment due him.

The total of one hundred forty and one hundred ninety would be three hundred thirty thousand, and there was obviously a problem there because the total amount due American Fidelity was only about \$240,000.00.

Mr. Garrison: If the court please, counsel is now suggesting to Mr. Marks the answer that he seems to seek.

Mr. McKinnon: Very well.

Mr. Garrison: And the same difficulty Mr. Bron-

(Testimony of Alfred R. Marks.)

son suggested with me earlier is now my problem with Mr. McKinnon.

Mr. McKinnon: Very well, I will reframe the question.

Mr. McKinnon: Q. On September 14, Mr. Hart sent a teletype, I believe, according to the evidence, demanding the payment of the balance of some \$190,000.00. Can you reconcile that teletype with the existing facts or not? Answer yes or no so we can proceed with great strictness here.

A. Yes, but I would like to make an explanation on it.

Q. If Mr. Garrison doesn't object, it is all right with me.

Mr. Garrison: Go ahead.

The Witness: A. I made an analysis of the amounts that were received by American Fidelity and Casualty Company by way [943] of credit to the bank account maintained in the Central Bank in Oakland for the period from August 21st down to September 14th, and my tabulations of the entries in that account showed that during that period \$59,000.00 was actually deposited in the account up to that point.

The \$59,000.00, roughly \$60,000.00, deducted from the \$240,000.00 figure you have mentioned, would leave roughly \$180,000.00.

Mr. McKinnon: Q. Very well. Now, have you a balance sheet of the Lotz Agency as of November 30th, 1950, adjusted to reflect equity in unearned premium reserve?

(Testimony of Alfred R. Marks.)

A. I have a balance that was prepared from the books without examination, without audit, but after having given effect to certain obvious adjustments, and giving effect of equity—to the inclusion of equity in unearned premium reserve carried on behalf of Lotz by companies whom Lotz represented.

Q. Will you let me see that a moment, please? This is in the form of a work sheet prepared by you, is it?

A. That is right.

Mr. McKinnon: We have no copies of this up to this time. We are going to offer it in evidence. (Handing document to Mr. Garrison.)

Mr. Garrison: Do I understand this is the balance sheet of the Lotz Agency as of November 30, 1950?

Mr. McKinnon: Q. Is that correct? [944]

A. I believe so.

Mr. McKinnon: That is what I thought it was. It says November 30, 1950.

The Witness: That is right, November 30, 1950.

Mr. Garrison: Well, we will object to the balance sheet of November 30, 1950, on the ground that it is for a period which hasn't anything to do with this case because the issues involved in this case arise as a result of acts of 1951. Whatever might have been the condition of Lotz' affairs in November, 1950, seem to me to be outside the issues.

Mr. McKinnon: It is a part, Your Honor, of a presentation of two balance sheets, one as of this date, which is the month in which Lotz became

(Testimony of Alfred R. Marks.)

agent for American Fidelity, and the second, which I am going to come to in a moment, which is one year later, after the termination of his agency with us and after his liquidation with us.

The Court: I will allow it to go in subject to motion to strike.

Mr. McKinnon: I offer this in evidence.

The Court: It may be admitted and marked.

(Whereupon document entitled Joe Lotz Insurance Agency, Balance Sheet, November 30, 1950", was received in evidence and marked Defendant's Exhibit Q.)

Mr. McKinnon: Q. Have you prepared a similar balance sheet as of November 30, 1951? [945]

A. I haven't prepared a balance sheet as of November 30, 1951, but—I don't know whether this has been—is a copy of a balance sheet. This is a copy of a balance sheet prepared by Lester, Herrick & Herrick, auditors in this matter for Mid-States, as of November 30, 1951, and except for certain adjustments to reflect equity in unearned premium reserves and other minor adjustments, I think it fairly reflects the condition presented by the books as of November 30, 1951. But I don't know whether this had been admitted as an exhibit.

Q. You don't know whether it is in the big report of January, 1953, of Herrick & Herrick?

A. Well, this is a report of Lester, Herrick & Herrick dated April 8, 1952.

(Testimony of Alfred R. Marks.)

Mr. McKinnon: Pardon me one second, Your Honor, and I think we can finish.

Mr. McKinnon: Q. Well, Mr. Horton was not sure whether that balance sheet you are looking at—

A. (Interposing) May I suggest, could I see the report that has been admitted as an exhibit?

Q. Here is a copy of it.

A. No, this is not the report that I am referring to. There is another report issued by Lester, Herrick & Herrick under date April 8, 1952, containing a balance sheet of the Joe Lotz doing business as Joe Lotz Insurance Broker and General Agent, as at November 30, 1951, and July 31st, 1951. [946]

Q. Well, our object, Mr. Marks, is to get from you and get into evidence a balance sheet as of November 30, 1951, using the Lester, Herrick & Herrick figures with adjustments you have mentioned.

Now, any convenient method that you can suggest will be satisfactory I am sure to his Honor and to Mr. Garrison.

A. I suggest that this balance sheet be put into evidence, and then take the schedules that I have prepared reflecting adjustments.

Q. Very well, I propose to do it that way. Shall we tear that out of that sheet? We don't want to put in the whole thing. This document is more than a balance sheet.

A. That is the report.

The Court: Do you want to lay a foundation for this document? What do you wish to do before he

(Testimony of Alfred R. Marks.)

tears that sheet out of there? Any objection?

Mr. McKinnon: I am sorry to present a problem, Your Honor, but this arose just before the noon hour and this is an item on which we are not fully prepared.

Mr. Garrison: We have no objection to any balance sheet dealing with the year 1951, the year in question, and if we can among ourselves find a balance sheet that reflects the conditions we won't make any point of it.

Why don't you let the subject rest for the moment and we will work it out? [947-8]

Mr. McKinnon: The left-hand being assets and the right-hand being liabilities.

(Whereupon the document referred to above was marked Defendant's Exhibit R for Identification.)

The Court: There is a representative of Herick's here. Does he identify this document?

Mr. Garrison: I believe he said he wasn't quite sure just what it meant. I thought we could do it at recess.

The Court: Maybe he knows now.

(Defendant's Exhibit R for Identification shown to Mr. Horton.)

Mr. Garrison: Yes, he says it is a copy of his report.

The Court: Very well.

(Witness excused.)

Mr. Kakures: Call Mr. Mead.

Mr. Garrison: Do I understand that the defendant rests?

Mr. Bronson: I haven't had an opportunity to announce it. Except for the cross-examination of the last witness, the defendants American Plan and American Fidelity and Casualty Company rest, Your Honor.

The Court: Are you in a position to go forward and examine the witness now?

Mr. Garrison: No. Mr. McKinnon suggested very courteously earlier that in view of the voluminous exhibit presented today, he had no objection if we cross-examined after [949] we digest the exhibit, which we hope will be tomorrow morning.

Mr. Bronson: We are resting subject to any further examination developed by the cross-examination.

Mr. Kakures: On behalf of the defendant Joe Lotz, Your Honor, I would like to have Mr. Mead take the stand.

Mr. Garrison: I would like Your Honor to understand that we started the first half this morning.

The Clerk: William B. Mead to the stand, previously sworn.

WILLIAM B. MEAD

a witness recalled on behalf of the defendants herein being previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as hereinafter indicated:

(Testimony of William B. Mead.)

Cross Examination

Mr. Kakures: Q. Mr. Mead, you testified this morning that from time to time you acted as attorney for Joseph Lotz Insurance Agency, is that correct?

A. That is correct.

Q. Recalling your attention now to the date of November 27, 1951, do you recall anything specific dealing with the Joe Lotz Agency on that date?

A. Yes, I do.

Q. What was that? [950]

A. November 27, 1951, was the occasion when certain documents were executed by Joseph Lotz in connection with an agreement with the Mid-States Insurance Company.

Q. And how did that come about, Mr. Mead?

A. Well, negotiations had been conducted for a number of days prior to November 27th, principally with Mr. Gerald Hatfield, a vice-president of Mid-States, and with Mid-States—or rather with one of Mid-States' Chicago attorneys, a Mr. Frank Czar, and also on some occasions with Mr. Carl Oldberg and Mr. George Kledzik. Those negotiations were concerned with the problem of Joe Lotz' indebtedness to Mid-States Insurance Company, and extensive discussions were held with the object of finding the best and most practical solution of the problem.

Q. In other words, as you resolved the problem, Mr. Mead, so far as Mid-States' problem was concerned, it was whether they were to keep Joe in business or stop him from business, is that correct?

(Testimony of William B. Mead.)

Mr. Garrison: I think that should be stricken out as a voluntary statement by counsel, because it would be impossible for any of us to know what motivated Mid-States Insurance Company at that time, and I think the question should relate to Mr. Mead's conversation on it.

Mr. Kakures: I will withdraw it, Counsel.

Mr. Kakures: Q. Did you talk with Mr. Hatfield in [951] relation to this problem?

A. Yes, I did.

Q. Could you tell us the context of that conversation with Mr. Hatfield?

A. I can give you the substance of it. I doubt that I could recall it word for word.

Mr. Garrison: Is this November 27th?

The Witness: This is prior. November 27th culminated a number of days of discussion.

Mr. Garrison: Let's have the time and place and parties present.

The Witness: The first occasion that I met Gerald Hatfield and Frank Czar was in my office. Mr. Lotz was also present. I don't recall on that first occasion whether Carl Oldberg was present or not.

The Court: Fix the date, as near as you remember it.

The Witness: As near as I remember it, it must have been four or five days prior to November 27th, Your Honor.

(Testimony of William B. Mead.)

On that first occasion, after introductions had been made, Mr. Hatfield asked a number of questions concerning what the situation was of the Lotz Agency and what if any solutions we had to suggest.

On that first occasion, I stated that I didn't know the exact amount of the indebtedness of Joe Lotz to Mid-States. However, I had some information that indicated that he was [952] in debt to Mid-States in the neighborhood of a couple of hundred thousand dollars, and that for some time past after or some time prior, that I had been attempting to work out a program for Mr. Lotz whereby he could overcome certain management difficulties that were being—that were bringing about certain losses. This we referred to in the conversation as the so-called "target plan."

I stated that I had understood from information gathered from Lotz and Mr. Smead, and also an accountant that Lotz had, that his overhead was running in the neighborhood of fourteen percent; that advance commissions to agents were running from twenty to thirty-two percent; that the loss ratio had been somewhat higher than it should have been, higher than the average loss ratio of California companies writing similar business; that in setting up the target plan that arbitrarily allocated ten percent to profit, eight percent to overhead and an arbitrary fifty percent to loss ratio, that it was the object and design in that target plan to reverse

(Testimony of William B. Mead.)

the agents' or sub-agents' commissions so that rather than being advance commissions, to make their commissions depend upon the loss ratio so that the sub-agent would receive his money dependent upon the actual experience with his account, so that therefore if the sub-agents' account had a fifty percent loss ratio, he would get the difference between the fifty percent and the difference remaining after fourteen percent to the company, ten percent arbitrary profit, and eight percent of overhead, which I believe, if my mental arithmetic is right, would pay an agent eighteen percent commission under those circumstances. In any event, the agents' loss ratio should be forty percent and he might conceivably get as much as twenty percent commission.

Mr. Hatfield discussed all the points in connection with that and agreed that that represented a form of solution to the overall problem.

Then another subject that was discussed was what amounts of money were owed to other companies besides Mid-States. Based upon information I had gotten from Mr. Lotz, I stated to Mr. Hatfield and Mr. Czar that, to the best of my knowledge, the outstanding accounts with other companies would not exceed four or five thousand dollars.

Then we discussed what would happen in the event that Mid-States Insurance Company should file a law suit against Joe Lotz or should attempt to proceed in bankruptcy. I told both Mr. Czar and Mr. Hatfield that in my opinion if either of those

(Testimony of William B. Mead.)

proceedings were undertaken, that it was highly unlikely that very much could be recovered for the benefit of Mid-States or any other small creditors that might be there; that I personally felt that the soundest solution to the problem that was confronting all the people concerned was to [954] continue to operate the agency, but to correct certain lax management practices, namely, the payment of advance commissions; secondly, that the overhead was too high, in terms of the volume of business being written, and that by more rigid and careful supervision of claims that savings would be forthcoming in the Loss Department which should result in getting more nearly average loss ratio.

Mr. Kakures: Q. And was it your understanding that Mr. Hatfield went along with this so-called plan of yours?

Mr. Garrison: I object to that on the ground that it calls for a conclusion, I think.

The Court: Yes.

Mr. Kakures: Withdraw that.

Mr. Kakures: Q. Did Mr. Hatfield state to you that he thought that under this plan the business could become solvent in from twelve to twenty-four months?

Mr. Garrison: I think, if the Court please, Counsel ought not to lead the witness, as I mentioned before, and should ask his questions without suggesting the answers.

Mr. Kakures: Q. What was Mr. Hatfield's response to this plan?

(Testimony of William B. Mead.)

A. On the first occasion that we met, he offered very little comment upon the proposal. He stated that he and Mr. Czar were looking into the entire matter and would attempt to determine, first of all, what all the facts might be, and then [955] would continue to meet with me and Mr. Lotz until they had reached a conclusion on precisely what they should do.

Q. And that conclusion would be whether they would make more credit available to Joe Lotz or not?

A. That was one alternative.

Q. Then in this meeting at the Hotel Leamington on November 27, 1951, Mr. Mead, were certain papers executed that day?

A. Yes. That happened to be an evening meeting, incidentally, we met at—I don't recall the room number, but in the hotel room of the Hotel Leamington. Mr. Hatfield was present, Joe Lotz was present, Mr. Frank Czar was present, Mr. Oldberg was present, and I was present. I don't recall whether Mr. Kledzig was present at that meeting or not, but I believe he was. On that occasion——

Mr. Garrison: What was the date?

The Witness: November 27th.

On that occasion certain documents were executed by Joe Lotz only. The first one that was—Well, I don't recall the exact order, but one of the documents that was executed by Mr. Lotz was in a letter form that we referred to in the meeting as a "letter of intention."

That letter of intention was not dictated by me.

(Testimony of William B. Mead.)

It was dictated in large part by Mr. Hatfield and Mr. Czar.

In that letter there were recited certain facts and certain intentions of Mr. Joe Lotz, mainly such things as the [956] hiring of George Kledzig.

Then there was another document executed by Joe Lotz, and that was a general assignment. That document is an exact copy of the general assignment form of the General Finance Company that was insisted upon by Mr. Oldberg.

Another document was the assignment of a specific fund in the hands of American Fidelity and Casualty Company, meaning the credit account of Joe Lotz.

There was also a discussion on that occasion, and the same subject matter was covered in a meeting a day or so before. I had requested that Mid-States sign a definite statement of what they would do in connection with the Lotz Agency. It was stated that they would not sign a document because under similar circumstances in their prior history they had joined in a formal document of participation in the operation of an insurance agency, and that subsequently the agency had failed and Mid-States was held liable to the other creditors of the agency for having assumed the agency position. Therefore, they didn't wish to have anything appear on the record as to any participation in the operation of the agency, but to remain solely as a creditor on the record.

Orally, however, Mr. Hatfield and Mr. Czar and

(Testimony of William B. Mead.)

Mr. Oldberg agreed that if Joe would execute the documents on October 27, 1951, that he could continue to write policies [957] of Mid-States Insurance Company, and that if management practices were put into effect such as described in the so-called target plan, that they were of the opinion, both Mr. Hatfield and Mr. Czar, that within a period of twelve months and certainly not to exceed twenty-four months time, the Joe Lotz Agency would be completely in the black.

Mr. Kakures: Q. In other words, at that time, Mr. Mead, as Joseph Lotz' attorney, you wanted some additional guarantee from Mid-States that if your client executed those documents, that he would have some protection, is that correct?

Mr. Garrison: That is objected to, if the Court please, on the ground the question is what was said and done and not what Mr. Mead wanted; calling for a conclusion, and hearsay.

Mr. Kakures: Well, Your Honor, I am trying to get the attorney of Joe Lotz at that time to explain his idea about this whole transaction.

The Court: Develop the facts, whatever they may be.

Mr. Kakures: Q. Before your client signed those documents, Mr. Mead, did you have any discussion on what part Mid-States would play in this so-called target plan?

A. Yes. Mid-States, through the voices of Hatfield and Czar, agreed that Joe would be—that is, the Joe Lotz Agency would be enabled to continue

(Testimony of William B. Mead.)

writing policies of insurance issued by Mid-States Insurance Company; that they would continue to keep the Agency going, provided that the [958] power were given to an official of Mid-States, George Kledzig by name, to act as general manager of the Agency, and that he be put on the payroll of the Agency; that so long as Joe lived up to the declaration of intention in the letter of October 27th, 1951, that nothing would be done by Mid-States to disturb it.

Q. So it was then——

A. (Interposing) Excuse me. It was the contention, however, that subsequently upon an audit of the books it were found that there was greater indebtedness to other companies than the four to five thousand dollars that was stated as being owed to other companies at that time, or if the so-called target plan did not work out over a reasonable period of time—six months or thereabouts—that Mid-States would have a free hand then to reappraise their position and take what action might at that time be advised.

Q. So it was with this understanding on your part that you allowed your client to execute these documents, is that correct, Mr. Mead?

A. That is the only consideration upon which the documents were executed at that time.

Q. A few days later was there another meeting held in relation to this matter, Mr. Mead?

A. Some two weeks later, around the fourteenth

(Testimony of William B. Mead.)

or fifteenth of December, there was a further meeting held. [959]

Q. And where was that meeting held?

A. That meeting was held in the Shell Oil Building in San Francisco, in Mr. Garrison's office.

Q. Who was present there?

A. Mr. Garrison, Mr. Carl Oldberg, Vice-President of Mid-States; Mr. Joe Lotz and myself.

Q. And what was the purpose of that conference?

A. That conference was requested by Mr. Oldberg for the purpose of having Joe Lotz grant to Mid-States further and more particular management powers over the Joe Lotz Agency.

Q. And that request was made upon you, of course, as the attorney for Joe Lotz?

A. That was requested in the meeting in Mr. Garrison's office.

Q. What was your reply to that?

A. I stated at that time to all those present that I had heard some statements previously to the effect that Mid-Sates was contemplating bringing a lawsuit, and that it was my then position, and had been all along, that the only result of a lawsuit would be the ruination of Joe Lotz, and that if it were a fact that a lawsuit was to be filed, then I would advise Mr. Lotz to grant no further concessions to Mid-States but we would take whatever position we were in and face the lawsuit from that position.

Q. And did Mr. Garrison in response to that tell you anything? [960]

(Testimony of William B. Mead.)

A. Mr. Lotz and I were asked to go out in the waiting room while Mr. Garrison and Mr. Oldberg held a conference. Mr. Lotz and I sat in the reception room for approximately ten minutes time when we were called back into the office.

Q. And when you were called inside, what happened after that?

A. Mr. Garrison stated to me that there would be no lawsuit filed.

Q. And what did you say to that?

A. I said, "Well, under those circumstances we are only too glad to give you every assistance possible, and what additional powers do you feel that you need now?"

Then a discussion was held about the subject matter of the additional powers.

Q. And then on that date did you execute, or did you have your client sign a memorandum dated December the 15th, 1951, in relation to those additional powers?

A. Yes. I believe that Mr. Garrison dictated substantially the document. I may have chipped in with a word or two here and there, but substantially it was Mr. Garrison's dictation.

Q. I am looking at Plaintiff's Exhibit 14, Mr. Mead, and would you look at that?

Mr. Garrison: I think you have the wrong document, Counsel.

(Discussion off the record.)

* * * * * [961]

The Witness: I think this is a different one. As

(Testimony of William B. Mead.)

I recall, the major point in the document I am referring to, there was an express permission to Mid-States to go directly to the post office box of Joe Lotz and receive the mail directly without any intervening hands. I don't recall that this is the document. Isn't there another document prior to this?

Mr. Kakures: Counsel, do you have a copy of the original of that? I don't think it is in evidence yet, Your Honor.

Mr. Garrison: I don't happen to have one. Let's see if we can find it for you. I am sorry Counsel didn't ask me for this a little earlier.

Mr. McKinnon: We asked Counsel for it about three weeks ago and they didn't provide it. By a Court order of——

Mr. Garrison: (Interposing) You saw all our files. Whether you saw it or not, I don't know.

Mr. McKinnon: No, I didn't see that and knew nothing about it.

Mr. Garrison: Can you go on, Counsel, while we look for this?

Mr. Kakures: Yes.

The Witness: I don't think I have quite finished before.

Mr. Kakures: Go ahead, Mr. Mead.

The Witness: I place that document due to the discussion of the fact that Mid-States wanted to have further access to [962] the mail, and, secondly, on the return trip over the bridge, Mr. Oldberg gave Mr. Lotz the paycheck for the prior period, and my recollection is that the pay periods were

(Testimony of William B. Mead.)

the 1st and the 15th and the check wasn't given to Joe until after this document was signed in the office of Mr. Garrison.

Q. In other words, under the agreement, was Joe Lotz hired by Mid-States Insurance Company?

A. Well, that was part of the agreement of November 27, 1951, that Joe's drawings were to be limited. I don't recall the exact amount. I believe his drawing was to be limited henceforth to, I believe, not to exceed \$600 a month. [963]

Q. Going back to this memorandum which was executed in Mr. Garrison's office on December 15th, Mr. Mead, since the original or copy hasn't been found as yet, I hope I can—. Do you remember what was in that document?

Mr. Garrison: I suggest we wait and find it and then we will be sure.

The Witness: A. Well, I have stated already the major point that I recall in it. I had a copy of that which I turned over to Mr. Dusky at his request, and since that time, which was at least a year and a half ago, I have seen neither the original nor a copy of that, so that the only point that remains very clear in my memory is the one about Mid-States wanting to have first access to the mail.

Mr. Kakures: Q. I see. And if you allowed your client, Joe Lotz, to sign that agreement on December 15th, or that memo, and he appeared in Mr. Garrison's office, and the assurance of Mr. Garrison and other Mid-States officials was that there would not be any lawsuit in this matter, is that correct?

(Testimony of William B. Mead.)

A. That is correct.

Q. Now, shortly after the 15th of December, Mr. Mead, did you have occasion to call Mr. Ray Titus of the Mid-States Insurance Company?

A. Yes. I don't recall the exact date of that. It was the same date that the telegram went forward to Mr. Titus. As I recall, it was either just before or just after Christmas. [964] That was a long distance telephone call made by me from Joe Lotz' office to Ray Titus in Chicago.

Q. What was the scope of that phone call?

A. The purpose of my call to Mr. Titus—or I should say what I said:

I called Mr. Titus to verify whether or not Mid-States was going to go ahead and continue to write policies or whether they were definitely going to write no more policies through the Joe Lotz Agency.

Q. And what was Mr. Titus' answer to that?

A. His answer, as I recall, was that they saw no purpose in continuing on with the Joe Lotz Agency and didn't intend to write any more insurance through it.

I then stated to him that I still thought that if Mid-States would cooperate, that it was possible to keep the Joe Lotz Agency going and also to minimize the losses that then appeared to be facing Mid-States. He stated that he didn't see how that could be done.

I stated to him that I thought it could be through the device of cancelling out the Mid-States policies and replacing the cancelled risks with another com-

(Testimony of William B. Mead.)

pany that we had had a preliminary contact with, the new company's policies to be written on straight cash commissions as opposed to the contingent commissions that were involved in the Mid-States deal; that by cancelling Mid-States policies there would be a [965] recapture of the advanced commissions to the agent. Then on top of that there would be an additional cash commission immediately realizable upon the substituted policy.

Mr. Titus said that that was pretty much what I had told him several days before when he was still in Oakland, and that he couldn't get it through his head how that was possible. So I said, "Well, I will send you a telegram."

I then prepared the telegram. Mr. Lotz, as I recall, signed the telegram, and that summarized the proposal that was made. And, if my memory is correct, the net figure showed that the ultimate loss to Mid-States if that program were carried through would be approximately \$32,500. Both Mr. Titus and Mr. Oldberg said that if that would get the ultimate loss below \$60,000, they would write it off and forget about it.

Mr. Kakures: Your Honor, would you like to take the recess?

(Short recess.)

Mr. Kakures: Q. Mr. Mead, before the recess you were testifying as to that phone call you made to Mr. Titus in relation to the plan. Now, did you make any other additional—have any other addi-

(Testimony of William B. Mead.)

tional communication with Mid-States on this matter?

A. With Mr. Carl Oldberg, who was present more or less all the time in Joe's office during the month of December. I told Mr. Oldberg we had made a contact with the *Curt Hitkey Agency* [966] in Los Angeles, and discussed with Mr. Oldberg the phase of the matter of inducing Curt Hitkey to re-write the Mid-States business in the event they would elect to cancel.

Mr. Oldberg stated that he would pay my expenses and a reasonable fee if I made that trip.

In company with Mr. Joe Lotz I did go to Los Angeles, and on the morning of December 31st I had a meeting with a Mr. John Lynch and another gentleman—I believe his name was Dillingham, if my memory is correct—both officers of the Curt Hitkey general agency. We explained the situation of the Lotz Agency to them, and it was agreed at that meeting that——

Mr. Garrison: (Interposing) If the Court please, I object to any conversation he might have had with Curt Hitkey on the ground that that would be hearsay so far as we are concerned, and also what was agreed would be a conclusion, I think.

The Court: The objection will be sustained.

A. (Continued) Following that meeting Mr. John Lynch came to Oakland to further discuss the arrangement that had been proposed in Los Angeles on December 31st. And following that meeting

(Testimony of William B. Mead.)

the expenses and fee were not paid by Mr. Oldberg or Mid-States.

Mr. Kakures: Q. In other words, that plan fell through, is that correct?

A. Mid-States never did agree to the plan. [967]

Q. Did the Mid-States Insurance Company ever—withdraw that.

Did Mid-States Insurance Company actually operate the Joe Lotz Agency under your agreement?

Mr. Garrison: Objected to on the ground that that calls for his conclusion. I think he should be required to show only the facts.

The Court: If he knows, he may answer the question yes or no.

The Witness: A. The officers of Mid-States, namely, Carl Oldberg, George Kresnik, and from time to time Mr. Titus and Mr. Hatfield, were directing the policy and employees of the Lotz Agency, to my own knowledge, up through the month of December, 1951.

Mr. Kakures: Q. You remember this morning, Mr. Mead, I believe you testified to the fact that, regarding those statements, I believe that ten-page statement by Mr. Smead written on that yellow legal paper which was brought into your office, I believe, approximately on or about December 6th. Was that an evening call?

A. To my knowledge, that statement has never been in my office.

Q. You testified this morning, Mr. Mead, that

(Testimony of William B. Mead.)

you notarized or put your notarial stamp of acknowledgment on that statement, is that correct?

A. I made the acknowledgment of the signature of Ralph Smead [968] upon his statement to me that it was his statement.

Q. In regard to the statement, Mr. Titus, who had testified earlier, stated that when the statement was shown to you you read it out loud and then you proceeded to add your notarial acknowledgment to that. Is that true?

A. I have never, even to this day, read the statement either out loud or to myself.

Q. And why was that?

Mr. Garrison: Objected to, if the Court please—

The Witness: A. Because I disapproved of it.

Mr. Garrison: Objected to, if the Court please, on the ground it would be immaterial why he didn't. The fact is, he said he didn't do it.

The Court: The ultimate fact is that he did not.

Mr. Kakures: Q. What was you—. Did you discuss this matter of the statement with any official of Mid-States Insurance Company?

A. Yes. As I related this morning, prior to any statement with Mr. Hatfield, and on the occasion of putting the acknowledgment form upon the statement, I discussed the method by which the statement had been obtained and requested that it be turned over to me and that I would prepare statements that I would be certain were of facts, and if I prepared them they would be verified in affidavit form.

(Testimony of William B. Mead.)

Mr. Kakures: That's all. [969]

Cross Examination

Mr. Garrison: Q. Mr. Mead, is this the letter that you referred to as having been prepared in my office on the occasion that you and Mr. Lotz came there?

A. No. There was a prior letter, Mr. Garrison. This was a letter that was made out to comply with the regulations of the Post Office Department.

Q. Isn't this the letter that was prepared in my office December 21st when you and Mr. Lotz were there?

A. I don't recall this letter having been prepared at that time.

Q. You said the letter that was prepared referred to the Post Office and the mail, didn't you?

A. Yes, but there was more to the letter than just that one subject. It was to give you, or rather Mid-States, the right to go directly to it, and as I recall——

Q. Right directly to the mail box? A. Yes.

Mr. Garrison: I will ask that this letter be received in evidence, if the Court please.

The Court: It may be admitted and marked.

Mr. Garrison: Q. It does bear Mr. Lotz' signature, does it not?

A. So far as I know, it is. I don't know for sure.

(Whereupon letter dated December 21, 1951, was [970] received in evidence and marked Plaintiff's Exhibit No. 36.)

(Testimony of William B. Mead.)

Mr. Garrison: I will read this, if the Court please.

“December 21, 1951.

“Mid-States Insurance Company,
182 West Lake Street

Gentlemen:

“I hereby grant you permission and hereby give you the key to my post office box 1887, and you are authorized to open such mail box and take from it all mails. And I further authorize you to open said mail and deposit any money included in said mail to my trustee account.

“You will keep a record of all such deposits available for my inspection.

“Yours very truly,

Joe Lotz, General Agent.”

And at the bottom I see it reads in handwriting:

“The undersigned vice-president of Mid-States Insurance Company agree to forthwith deliver to Lotz all mail and money and checks not connected with Mid-States Insurance Company.

Signed, Carl Oldberg.”

Mr. Garrison: Q. Were you present when he wrote that on?

A. I don't recall it. Let me look at that again, Mr. [971] Garrison. No, according to this stenographic indication, this is a letter dictated by Joe Lotz and written by someone with the initials “MK.”

(Testimony of William B. Mead.)

I do not believe that was a document prepared in my presence at any place.

Q. My question only is, were you present when Mr. Oldberg put the postscript on the bottom?

A. I have no recollection of it.

Q. All right. I show you a wire, and ask you if this is the wire you refer to that you sent to Mr. Titus in which you arrived at—rather, that contained your proposal for the solution of Mr. Lotz' problems?

A. This probably is, Mr. Garrison. My recollection is that it was signed "Joe Lotz", and this says "Lotz Insurance Agency." I don't recall, of course, whether this is word for word the way it was, but a letter of confirmation quoting the wire in full also went forward the same day.

Q. Yes, I have that letter, but my reference now is to the wire.

A. I assume that that is about right. It comes out a conservative debit \$32,645.

Q. You took into consideration, did you not, that at that time Mr. Lotz owed companies some \$325,000, according to your statement?

A. I accepted the unaudited figure given to me by Mr. Titus, Mr. Hatfield, and Mr. Kledzik. [972]

Q. And you knew that the premiums on a great bulk of that business had already been collected from sub-agents and disbursed by Mr. Lotz to others, did you not?

A. I knew that there were some that had not been paid for and some that had been paid for, but

(Testimony of William B. Mead.)

exactly how much I didn't know and it didn't make much difference in the ultimate outcome. And I assumed in that wire that the three hundred twenty-five thousand had been paid for and already used up.

Q. Yes, that's right. So that your wire and your proposal contemplates that this business in the name of Mid-States be cancelled and written by some other company? A. That is right.

Q. And did you take into consideration the fact that when Mid-States cancelled this they would have to give the assureds back the premiums?

A. Very definitely.

Q. And your plan contemplated their putting up this return premium, did it?

A. Yes, indeed. And I submitted the whole plan to the auditor and he agreed with the calculations that I made.

Q. That would mean, then, that Mid-States Insurance Company would have to put up some substantial portion of \$325,000? A. Yes.

Q. And you assumed, I take it, that someone else would take that liability on, and knowing that the premiums had already [973] been paid by the assureds and that the money wasn't available?

A. Oh, no. There would be a refund of premiums by Mid-States.

Q. I see. Then you take into account here the \$97,500 credit for commissions?

A. Yes. Taking one policy as an example, Mr. Garrison——

(Testimony of William B. Mead.)

Q. No, I am not worried about examples at the moment. Your plan assumes a \$97,500 commission on this rewrite arrangement.

A. Well, I don't recall the exact figure.

Q. That is what you have here.

A. Whatever is stated there.

Q. And then you say, "Also plus \$32,500 on re-writes," so you assume a commission receipt there of—

A. (Interposing) Oh, that this \$97,500 would be a recapturable credit. In other words, on the cancellation of the policy the agent who had written that particular policy would have to put back his portion of the commission, and that is the ninety seven thousand five hundred referred to. The thirty two-five would be at a lesser rate, a ten per cent commission derived on the new rewrite business.

Q. Did you ever try to collect—

Mr. Bronson: I suggest, Your Honor, that if it is going to be put in evidence it be read now so that Your Honor gets the significance of the comments of the witness and the questions of counsel. Do you intend to put it in evidence?

Mr. Garrison: I didn't intend to. I will if it is of any [974] interest to the Court beyond this short examination.

Mr. Bronson: It must be of interest if you are going to question on it.

Mr. Garrison: Well, I will put it in.

Mr. Bronson: Otherwise, we will have to strike the evidence out as having no bearing.

(Testimony of William B. Mead.)

Mr. Garrison: Mr. Bronson, I will offer it if I decide I want it. If I don't offer it, you can put it in.

Q. Mr. Mead, did you ever try to collect back from agents commissions that had already been paid them on business they had written and that was being cancelled by the company?

A. Not that I recall.

Q. It's an experience you might try some time. But this assumes that every penny of these commissions would be recovered from every one of those agents that had been paid commissions.

A. I would say it would be proper assumption.

Q. And the only thing you needed in putting this over was for Mid-States or somebody else to put up \$325,000, at that time?

A. No, they wouldn't have to put up \$325,000, no.

Q. I see.

Mr. Garrison: To accommodate counsel, I will offer this in evidence.

The Court: Let it be admitted and marked next in order.

(Whereupon document referred to above was [975] received in evidence and marked Plaintiff's Exhibit No. 37.)

Mr. Garrison: Q. Now, you say that on November 27th, at the Leamington Hotel, Mr. Hatfield and Mr. Czar prepared some statement and you were present?

A. I didn't say they were prepared at the Leamington.

(Testimony of William B. Mead.)

Q. They were dictated?

A. I believe they were actually typed in my office, but the substance was prepared by Mr. Czar and Mr. Hatfield.

Q. All right. Now, this substance preparation occurred in the Leamington Hotel, did it?

A. Well, I don't know. No, they were—the documents were all——

Q. I mean the preparation of the document, the background discussion.

A. Well, those were all completed documents with the exception of not being executed at that evening meeting.

Q. Well, then did you start talking about the document dated November 27th that you say was typed in your office?

A. Oh, a number of days before. I can't tell you the exact date, but discussions went on over several days prior to that time.

Q. All right. And the document you are referring to is Plaintiff's Exhibit 6, is it?

A. Yes. This is what I referred to as the statement of [976] intention.

Q. All right. And this has been discussed for two or three days and then it was prepared in your office?

A. It was typed, but it was not prepared in my office.

Q. And where was it—was it typed from notes?

A. Typed from longhand notes, as I recall.

Q. And who made those notes?

(Testimony of William B. Mead.)

A. I understand Mr. Hatfield.

Q. You were not present?

A. I was not present when they were prepared. Just the mechanical typing job was done in my office.

Q. Did you discuss the subject with them when the mechanical typing job was done in your office?

A. I discussed with Mr. Hatfield, I suppose, at one time or another during those three or four days substantially all the matters that are set forth in that document.

Q. And on the occasion when it was typed on November 27th, was Mr. Lotz present?

A. I don't believe he was present when it was being typed.

Q. He came in after, did he?

A. As I recall, I met him that evening and went to the Leamington Hotel.

Q. Were these executed at the Leamington?

A. That's my recollection, that they executed them there at the Leamington. [977]

Q. And yourself and Mr. Smead went to the Leamington, and that is where the document was executed?

A. That's my recollection.

Q. Before it was executed, did you read it?

A. Yes, I read it.

Q. Did Mr. Lotz read it?

A. I assume so, but I don't recall whether I actually saw him read it.

Q. Did it contain a correct statement of facts as you knew them?

A. Not verified facts.

(Testimony of William B. Mead.)

Q. I didn't ask you about "verified facts," but so far as you were concerned, were the statements in here——

A. (Interposing): Let me glance at it again.

Q. Surely.

A. The only matter that I knew very little about at that time was this Public Service matter. Otherwise, I think the rest of the matters had been pretty well discussed.

Q. And it is signed by you as well as Ralph Smead and Mr. Lotz?

A. Yes, that is correct.

Q. Now, the document, reading one paragraph here, says—and the letter is addressed to Mr. Hatfield, dated Oakland, California, November 27th:

"Mr. Hatfield: [978]

"I wish at this time of my own free will and accord to relate to you the facts and circumstances surrounding the financial difficulties in which I find myself today, and to explain to you in detail to the best of my knowledge how it happened.

"As far back as last July, I had been losing money and was unable to pay my account to American Plan Corporation and other debtors, and it became necessary for me to use trustee funds in the operation of my business. By August 31, 1951, I was insolvent to the extent of approximately \$100,000, and where I should have had approximately \$190,000 in the trustee account, there was only \$4,000 in hand and in cash in banks."

Mr. Garrison: Q. Did you verify those figures?

(Testimony of William B. Mead.)

A. No. I asked Mr. Lotz and Mr. Smead if they were correct and they said they thought so.

Q. It says: "The American Plan Corporation was insistent that I make a payment on my account, so I made arrangements with the Public Service Insurance Company to pick up approximately \$133,000 of insurance. I paid them a 25 per cent commission for this business which amounted to approximately \$33,000 and received from them a net amount of about \$100,000. I wrote the insurance up in the [979] Mid-States Insurance Company, but instead of leaving it in the trustee account for Mid-States, I paid this money to American Plan on their bill. I still owed them around \$60,000 and so around the first of November I made arrangements with American Plan to cancel about \$60,000 worth of insurance I had written with them but had not paid for and switched this over to Mid-States."

Did you ask them if that was true?

A. Yes, as I recall I asked if that was the fact.

Q. "The result is that I am now unable to pay my account with you which will be due December 1, 1951, amounting to approximately \$64,000, and I don't know where the money is coming from to pay you for the Public Service or American Plan business and the other new business I have been writing; because the latest figures I have from my auditor are October 31, 1951, when I only have \$4,700 cash and \$95,000 due me from my agents and I owed companies \$361,000."

(Testimony of William B. Mead.)

Mr. Garrison: I won't go through the whole letter, but the concluding paragraph is that:

"I again want to ask your consideration of the above plan as a basis for the continued operation of my agency, and will appreciate greatly any [980] consideration you see fit to grant me."

Mr. Garrison: Q. Now, it is a fact, is it not, Mr. Mead, that that was a proposal that Mr. Lotz made to the Mid-States Insurance Company which he hoped they would accept and which they ultimately declined, isn't that correct?

A. No.

Q. Well, they didn't go through with it, did they?

A. They eventually withdrew from it.

Q. Certainly. And the letter was delivered to Mr. Hatfield with the concluding paragraph as a request for consideration.

A. Well, I would say it was Mr. Hatfield's letter signed by Joe Lotz.

Q. Well, it was also signed by you?

A. Yes, that is right.

Q. As his attorney? A. Correct.

Q. And it represented his intent at the moment?

A. Well, it was a letter of intention that was required by Mid-States.

Q. Surely. Now, you recall receiving a letter dated January 24 from Mr. Hatfield—1952?

A. Yes, I do, and I immediately replied to his letter.

Q. I didn't ask you about that. I just asked if you recall receiving this letter. A. M-hm.

(Testimony of William B. Mead.)

Mr. Garrison: I ask that this letter be received in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Thereupon letter dated January 24, 1952, Hatfield to Mead, was admitted into evidence as Plaintiff's Exhibit No. 38.)

Mr. Garrison: I would like to read this, if I may, Your Honor. (Handing document to counsel.)

Q. Referring, while they are reading that, to this letter of November 22nd which you and Mr. Lotz and Mr. Sinead signed, on page 2 it says:

"I hereby authorize Mid-States Insurance Company, or any of its officers, agents, or employees to inspect and examine all the books and records pertaining to the operation of my agency at any time, and to pay all out-of-pocket expenses in connection therewith.

"I realize that I have violated my agency agreement with you, and agree that you are not waiving and have not waived any rights accruing to you from such violation, and I further agree that you have the right to cancel my agency agreement, dated September 1, 1951, at any time without notice and with or without cause, and I hereby hold you blameless and harmless for any loss that I might [982] sustain due to such cancellation by you."

You read that in that letter, Mr. Mead?

A. I recall that. We had a discussion about this.

Q. Do you remember the document that was executed by Mr. Lotz dated December 28, which I show you, as Plaintiff's Exhibit 14?

(Testimony of William B. Mead.)

A. I don't have an independent recollection of this at this time. I don't at this moment recall the circumstances of that, Mr. Garrison.

Q. Is it true that you discontinued representing Mr. Lotz about the end of 1951?

A. I think it would be early January, with the exception that I did another favor for him in the spring of the year.

Q. With that exception, you terminated about the end——

Mr. Bronson: Let me have the rest of the answer, if you please, counsel.

Mr. Garrison: I move to strike out the reference to "favor" because it isn't material to my question.

The Witness: A. It was a legal matter is the reason.

Mr. Garrison: Q. I see. When was it, then, you discontinued your professional representation of Mr. Lotz?

A. Well, let me give you a complete answer on that. I told Joe Lotz in October I had a very heavy trial schedule coming up and would just as soon he would find someone who had more time to devote to his matter; that I would give him some time [983] if I could, but it would have to be from time to time and in evenings, and after the first of the year—I don't recall—well, might be up until the first week in January.

Q. Yes?

A. But certainly it would be very sporadic. I may have talked to him a few times.

(Testimony of William B. Mead.)

Q. Have you finished? A. Yes.

Q. The letter of December 28th—the reason I asked you, your lack of familiarity with the letter, that would be occurring just about the time you ceased to be Mr. Lotz' attorney?

A. Well, the last matter that involved any amount of time was the trip to Los Angeles to see Curt Hitkey and return.

Q. I see.

A. And then after that particular time there was very little time that I had available for Joe.

Q. Now, this letter which follows the November 27th letter which I read, which is dated a month later, December 28th, says, to Mid-States Insurance Company:

“Gentlemen:

“Please be advised that I plan on limiting the size of my insurance agency business and plan on vacating the second floor area now occupied by me at 315 Fourteenth Street, Oakland.

“I hereby agree to rent to you all furniture [984] and equipment owned by me and located on said second floor per inventory attached hereto and marked Exhibit A. Should you elect to rent said equipment you shall have the right to do so for a period not to exceed one year for a total rental of \$1200.”

Mr. Garrison: Q. You knew, as a matter of fact, he did make this rental arrangement with Mid-States?

A. My recollection is that some time shortly

(Testimony of William B. Mead.)

after the 15th of December Joe's office was taken over by Mr. Kledzik, and Joe was moved downstairs into new space not previously used by the Lotz Agency, and a greater measure of control over the business was exercised by Mid-States from that point on.

Mr. Garrison: I move to strike out the latter part of the answer as not responsive to my question and being purely voluntary.

The Court: It may go out.

Mr. Garrison: Q. Mr. Mead, reading further:

"You are to have possession of all my books, accounts and records covering my insurance agency business prior to this date. It is understood and agreed, however, that said books and records shall not be removed from the second floor area to be occupied by you, and I and my agents and accountants shall have access to said books and records at any time during business hours. At such time as you have [985] no further use for such books and records, they are to be returned to me.

"You have previously cancelled my general agency appointment and I have executed assignments to you representing monies due me in connection with business written by the Joe Lotz Agency.

"Nothing in this letter or any arrangement in connection with your cancelling this business shall be construed as an agency appointment or contract of employment.

"It is further understood and agreed that your occupancy of the second floor space is an arrange-

(Testimony of William B. Mead.)

ment of convenience only, and shall not be construed as being connected with my activities as an insurance agent.

"I further agree to hold your company and your agents and employees harmless by reason of their actions in the cancellation of any business written by me, the return of the premiums therefor, and the payment of claims arising thereunder, and no liability shall arise to you and them because of the use of any of my books and records because of postings or entries made therein or otherwise.

"Very truly yours,

Joe Lotz." [986]

Mr. Garrison: Q. Unfortunately, you were not aware of that letter, I take it.

A. Let me put it this way, Mr. Garrison: As I sit here, I have no recollection of the circumstances surrounding that. I have been trying to recall whether I was or not, but I don't as I sit here.

Mr. Garrison: Now, the letter I have asked to be introduced as Plaintiff's Exhibit 38 is dated January 24th, and I would like to read it if I may.

It is addressed to Mr. Lotz, registered mail, with a copy to Mr. William B. Mead. It says:

"Gentlemen: This letter is written to record my conversation with Mr. Mead yesterday and also to formally tender to you monies in our possession which belong to agents, assureds, or companies as a result of business placed by Mr. Lotz in companies other than Mid-States.

"On December 28, 1952, you entered into an agree-

(Testimony of William B. Mead.)

ment with Mid-States Insurance Company evidenced by a letter signed by you as of that date, whereby Mid-States took over the second floor of the building occupied by you and rented from you certain equipment used by you in connection with your agency.

"This letter recites clearly the fact that Mid-States had previously cancelled your agency [987] appointment and that the rental of your equipment and the occupancy of that space was an arrangement of convenience only and not to be construed as being connected with any of your activities as an insurance agent, and particularly were the activities not to be construed in any sense as creating a relationship of principal and agent between yourself and them.

"Since that time certain funds have come into their possession in the form of cash and checks as referred to above, and Mid-States has repeatedly attempted to deliver those funds to you for ultimate transmittal to the persons to whom they belong. In my conference with Mr. Mead yesterday, Mr. Mead stated that he was advising Mr. Lotz not to accept the money because both he and Lotz were doing everything possible to make it appear that Mid-States had taken over the Lotz Agency and were carrying it on as an agent of Mr. Lotz. Mr. Mead, to use his own words, said: 'That is the only shelter Joe has.' This subterfuge was originally evidenced in your letter to Mid-States Insurance Company under date of January 5, 1952, wherein you state 'ever

(Testimony of William B. Mead.)

since you took over the Joe Lotz Agency.' That letter was answered by a letter from our counsel, Maynard Garrison, dated [988] January 8, 1952, wherein he stated, 'I wish, however, in this letter, to correct the statement made by you that Mid-States took over the Joe Lotz Agency'.

"So that there will be no question in the future, this letter is recorded for the purpose of first denying any possibility of an agency relationship between the Mid-States Insurance Company and Joe Lotz and to make public the fact that we are fully aware of your effort to create a relationship between yourself and Mid-States Insurance Company in fiction which does not exist in fact.

"Very truly yours, Mid-States Insurance Company, Gerald Hatfield, Vice President."

Mr. Garrison: Q. Do you recall receiving that letter? A. I do.

Mr. Garrison: That is all.

Mr. Kakures: No further questions.

(Witness excused.)

Mr. Kakures: Call Joe Lotz.

JOSEPH P. LOTZ

defendant herein, recalled as a witness, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as hereinafter indicated: [989]

Direct Examination

Mr. Kakures: Q. Mr. Lotz, when did you first

(Testimony of Joseph P. Lotz.)

get into the insurance business as either a salesman or broker or agent?

A. As a life insurance agent or general? What do you mean?

Q. Just generally speaking.

A. I started in the life insurance business in 1923.

Q. What was your capacity at that time?

A. I was just a direct agent.

Q. Where was this?

A. In Iowa. Sioux City, Iowa.

Q. What did you do before that?

A. I played some baseball, and I was also in the mercantile business.

Q. And after Iowa, where did you go from there, after you left the State of Iowa?

A. After I left what?

Q. The state of Iowa.

A. I came out here in 1941.

Q. And did you engage in the insurance business at that time?

A. Yes. I worked in the shipyards for a while, and then later on got into the insurance business, two or three years.

Q. And when was your first contact with Mid-States Insurance Company, Mr. Lotz?

A. That was in 1947.

Q. With whom did you meet at that time? [990]

A. With Mr. Donnelly.

Q. Was this in Oakland?

A. This was in Los Angeles.

Q. And your discussion was in relation to your

(Testimony of Joseph P. Lotz.)

getting into the insurance business as an agent?

A. Yes.

Q. Representing Mid-States Insurance Company? A. Yes.

Q. Then did you have occasion to see Mr. Donnelly after that first meeting? A. Yes.

Q. And where was that?

A. He came to Oakland several times.

Q. Did you discuss your problems with him in relation to your business? A. Yes.

Q. And of what kind or nature were they?

A. I mentioned to him that——

Mr. Garrison: If the Court please, we will object to any conversation with Mr. Donnelly in 1947, or any conversation prior to 1951, on the grounds previously stated, that it is remote insofar as the issues of this case are concerned and don't tend to prove or disprove any issues in the pleadings, and incompetent, irrelevant and immaterial.

The Court: I will allow these preliminary questions. [991] Get to what you want and let's get through with the witness.

Mr. Garrison: And may that objection go along with any other questions on the same subject?

The Court: I can't anticipate what isn't before me. Proceed.

Mr. Kakures: Q. In 1951 were you writing insurance in the Mid-States Insurance Company, Mr. Lotz? A. Yes.

Q. And were you also writing insurance for any other insurance company at that time?

(Testimony of Joseph P. Lotz.)

A. Yes. American Fidelity.

Q. Who else?

A. And a small portion with West American, Traders & General, and some various companies where I wrote public liability and various types of fire insurance, and so forth.

Q. And from 1947 to 1950 how did you fare in the insurance business, Mr. Lotz?

Mr. Garrison: May the record show the same objection, if the Court please on the same grounds?

The Court: Same ruling.

Mr. Kakures: Your Honor, I am trying to show——

The Court: (Interposing): He may answer the question.

The Witness: A. I made an average living, if that is what you mean. Is that what you mean?

Mr. Kakures: Q. Yes. [992] A. Yes.

Q. And did you in accordance with the insurance code set up your trustee accounts? A. Yes.

Q. And how did you operate thereon? Did you try to follow the full extent of those provisions there? A. Yes.

Q. And in remitting funds to the insurance companies did you have just one trustee account or did you have various trustee accounts?

A. Just one.

Q. After you put your premiums collected in this trustee account, was there any way of segregating those belonging to the companies? A. No.

Q. Did that concern you at all, Mr. Lotz?

(Testimony of Joseph P. Lotz.)

A. No. It was all in one fund.

Q. And to your knowledge at that time in the insurance business was that the custom of the trade, or regular useage? A. Yes.

Q. When did you have occasion to first meet Mr. Hatfield, Mr. Lotz?

A. In 1949 or 1950. I imagine it was the latter part of 1949, possibly.

Q. At that time, when you first met Mr. Hatfield, had you [993] also at that time had an agency agreement with the American Plan?

A. Not in 1949, no.

Q. When did you first write for the American Plan?

A. Actively, approximately in January of 1951.

Q. You took a trip to Chicago, did you, in 1951?

A. I went to New York and stopped in Chicago on the way back.

Q. What was the purpose of your trip there—to New York?

A. Mr. Hart requested that I come to New York to discuss our problems.

Q. I see. And your problems were financial, weren't they? A. Yes.

Q. And then you went to Chicago from there?

A. Yes.

Q. And whom did you see there?

A. I saw Mr. Titus, Mr. Reynolds, Mr. Hatfield, and most of the officials of the Mid-States.

Q. That was in relation to seeking another contract with Mid-States, is that correct?

(Testimony of Joseph P. Lotz.)

A. Not just another one, but an improvement of my contract if I could.

Q. Then you came out to the coast, is that correct? A. Yes.

Q. Then how soon after that did Mr. Hatfield come out to see you? Let's see, you got here sometime in August, did you? [994]

A. Yes. It was, let's see, around November, I think.

Q. And according to Mr. Hatfield's conversation, during this period of time you drove him over to San Francisco, I believe. A. Yes.

Q. To see the insurance commissioner, is that correct? A. Yes.

Q. During this period of time, November, did you discuss your situation with Mr. Hatfield?

A. Yes.

Q. And exactly what did you discuss? I mean, generally speaking.

A. Well, the discussions were concerning possibly—possibly the big item was getting a readjustment of rates with the insurance department.

Q. I see.

A. That is one reason we came over almost every day to see the insurance commissioner. I did not go up to see him, but I waited. We had hopes of getting those rates readjusted, but we failed.

Q. At that time did Mr. Hatfield tell you that he would do the best he could possibly do for you under the circumstances? A. Yes.

Q. And what was the nature of that assurance?

(Testimony of Joseph P. Lotz.)

A. Well, there was no real assurance. And most of our discussions were worked out with Mr. Mead in the office along the [995] lines of what Mr. Mead testified. I don't know what other discussions there were, much.

Mr. Kakures: Your Honor, would you like to take a recess until tomorrow morning?

The Court: You can go ahead. I will run until six o'clock tonight so we can make some headway here. Proceed.

Mr. Kakures: Q. Then when you talked about your problems, Mr. Hatfield told you that he would try to do everything he could for you, is that correct?

A. Well, I don't remember those words.

Q. Did you have assurance from any official of Mid-States during your financial crisis there in 1951 that they would do what they possibly could for you if you cooperated with them?

A. That was the general trend, yes.

Q. I see. And coming down to these assignments, and these powers of attorney and all the other documents that have been put in evidence and which you have seen and executed, you executed those with the knowledge that you would get the cooperation from Mid-States, as much as they saw fit to give you, is that correct?

A. Yes.

Q. And one of those promises was that they wouldn't file a lawsuit against you, is that correct?

A. Yes.

(Testimony of Joseph P. Lotz.)

Q. And another was that they would try to keep you in [996] business? A. Yes.

Q. And the assignments also provided for them taking over your business, is that correct?

A. Yes.

Q. And what did that entail? Did you just step out from your office, Mr. Lotz?

A. I rented a space on the first floor. My office had been on the second floor and still was.

Q. Were you writing insurance for anybody at that time when you stepped out?

A. I have a few companies that I was transacting a small amount of business with, yes.

Q. You turned all your assets and all your equipment over to Mid-States, is that correct?

A. Yes.

Q. And you also gave them the authority to open your mail, is that correct? A. Yes.

Q. And that was done under the condition to which Mr. Mead testified, is that correct?

A. Yes.

Q. And when did Mid-States revoke your agency agreement, Mr. Lotz?

A. I think it was in January, latter part of January. [997]

Q. Who informed you of that?

A. Well, I was informed by a letter from Chicago, I think signed by the president of the company.

Q. And did you respond to that? A. No.

(Testimony of Joseph P. Lotz.)

Q. Did you try to answer that letter revoking your agency at all? A. No.

Q. How was your health? Strike that. Was your health affected by this action by Mid-States?

A. My health wasn't very good at that time due to the difficulties I had.

Q. After this revocation of your agency, Mr. Lotz, what happened after that?

A. Well, after that I had an operation, and when I got well—Is that what you want to find out, Mr. Kakures, or what?

Q. In other words, did you continue in the insurance business after that?

A. I continued in the life insurance business.

Q. And at the present time what is your occupation? A. Life insurance business.

Mr. Kakures: That is all.

Mr. Garrison: I have no questions.

The Court: Any questions?

Mr. Bronson: No, we have no questions.

(Witness excused.) [998]

The Court: Now, how many other witnesses are going to be called in this case? Let's try to check up on what is ahead of us.

Mr. Bronson: Our case is concluded with the conclusion of Mr. Marks' testimony, the accountant, except for any possible testimony that may be aduced from rebuttal.

Mr. Kakures: We are concluded, Your Honor.

Mr. Garrison: We will cross-examine Mr. Marks

in the morning, and we will have three short rebuttal witnesses and should finish comfortably tomorrow.'

The Court: Will you get through by noon, tomorrow, do you think?

Mr. Garrison: That might be a little tight.

Mr. Bronson: That is your answer, I guess.

The Court: Well, I will convene at 9:30, if you wish.

Mr. Garrison: Fine with me.

Mr. Bronson: That is agreeable.

Mr. Garrison: You would like us to try to finish by noon?

The Court: I want to give you all the time you wish.

(Further discussion relating to adjournment and setting time for argument omitted.)

(Whereupon an adjournment was taken until 9:30 a.m., Friday, May 14, 1954.) [999]

The Clerk: Mid-States Insurance Company and Anglo-California National Bank versus American Fidelity and Casualty Company, et al., further trial.

Mr. Garrison: Ready.

Mr. McCallum: Ready.

Mr. Bronson: Ready.

MARTHA KEYES

a witness called on behalf of the plaintiff herein in rebuttal, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: State your full name and occupation to the Court.

The Witness: Martha A. Keyes.

The Clerk: Will you please keep your voice up?

Mr. Garrison: A little louder. This is a large room, and it is hard to hear.

The Witness: I am a secretary.

Direct Examination

Mr. Garrison: Q. Where do you reside?

A. In Hayward.

Q. And are you employed? [1001]

A. Yes, I am.

Q. And what type of work do you do?

A. Secretary.

Q. Were you during the year 1951 employed by Mr. Lotz in Oakland? A. That is right.

Q. And what were your duties there?

A. I was secretary to Mr. Lotz and Mr. Smead, who was General Manager.

Q. Are you married? A. Yes, I have.

Q. Have a family? A. Yes.

Q. How long were you employed by Mr. Lotz?

A. Very close to a year. It was from April, 1951 to—I left the employment the 27th of February, 1952, but actually it wasn't Mr. Lotz the last couple of months.

(Testimony of Martha Keyes.)

Q. What, in addition to your secretarial duties for Mr. Lotz, did you do?

A. Well, actually everything I did was in the nature of secretarial work—opening the mail and, oh, there was a certain amount of supervision at the time in the absence of either Mr. Lotz or Mr. Smead.

Q. Did you have anything to do with the teletype machine?

A. Yes. In fact I was sent over to the teletype company [1002] instruction in how to operate it when they first got it.

Q. Did you operate it while you were there?

A. Yes, I did.

Q. How did you operate a teletype machine?

A. It is very much like a typewriter, except that it is like a telephone in the respect that you are answering and receiving. You can send them and wait until they say “end” and get the information.

Q. In other words, there is a roller of paper that comes across, and you type the message on that paper, and you sit there and the report is transmitted to the person to whom it is being sent?

A. That is right.

Q. There is a permanent record of the message kept?

A. That is right. You tear it off and put it in a permanent file.

Q. And did you maintain a file in Mr. Lotz' office for teletype messages?

A. That is right, yes.

(Testimony of Martha Keyes.)

Q. Where was that file kept?

A. In the correspondence file in the front.

Q. Was that near your desk?

A. Yes, the correspondence file was next to my desk.

Q. That was what kind of a file?

A. It was a regular steel file and was of legal size. [1003]

Q. What was the character of the file where the teletypes were kept?

A. They were ordinary manila folders, alphabetized.

Q. And these messages would be torn off? They would be different sizes, I presume?

A. Yes. Some would be small and some large, but they would be in date order in the file.

Q. What instructions did you have from Mr. Lotz with respect to maintaining those messages?

A. Actually, I hadn't any particular instructions as to how to keep them.

Q. What would you do?

A. I set up the file myself and maintained it, Mr. Garrison.

Q. Did you keep them all?

A. I tried to keep them all. There were many that I couldn't.

Q. Calling your attention to sometime in the latter part of 1951, do you recall a telephone call—Withdraw that.

Did you take telephone messages as they came in?

A. I answered the telephone always if I were at

(Testimony of Martha Keyes.)

my desk, and if they were calls for Mr. Smead or Mr. Lotz, if they were not there I talked to the individual. If they were there, I spoke to the person first to find out who it was.

Q. Keep your voice up, please.

If they were in, then you would transfer the call into [1004] the office involved?

A. That is right.

Q. Do you recall an incident occurring sometime in the latter part of 1951 in connection with a telephone call and a teletype message filed?

A. Yes, I recall.

Q. What happened in respect to a telephone call and the teletype message file?

A. Well, it was with regard to a specific incident where Mr. Smead asked me to bring the teletype file to him while he was on the telephone talking to New York.

Q. He had received a call or sent one—placed a call to New York or received one?

Mr. Bronson: Will you please ask the date of this, Mr. Garrison?

Mr. Garrison: Yes.

Mr. Garrison: Do you recall about when it was?

A. I remember it as being the latter part of September.

Q. Do you know whether Mr. Smead placed the call or the call came to him?

A. I believe it was a call Mr. Smead placed to New York.

(Testimony of Martha Keyes.)

Q. Was the telephone call still going on when you were asked to bring in the teletype file?

A. Yes. He had the receiver off the hook.

Q. Did you take the file in? [1005]

A. Yes, I did.

Q. And he was then with the receiver in his hand? A. That is right.

Q. What did you do?

A. I went back to my desk and closed the door.

Q. Left the file there?

A. That is right.

Q. Did you see the file thereafter?

A. Yes. It was my custom to go in and pick up anything in the way of files in the afternoon.

Q. And did you see the file?

A. I went in and got the file, yes.

Q. Was Mr. Smead there?

A. He was there, yes, sir.

Q. Did you have a conversation with him about it?

A. Yes. I asked Mr. Smead if I should pick up the messages that were out of the file on his desk, and he said, "No," he would give them to me later.

Q. Did he ever give them to you?

A. No. I asked him for them the next day, and they were no longer on his desk, although I tried to locate them.

Q. Did you ever see those messages again?

A. Never saw those messages again.

Q. Did you have a request from someone in con-

(Testimony of Martha Keyes.)

nection with Mid-States to make a copy of the teletype messages in the file? [1006]

A. Yes. That was in November.

Q. 1951? A. 1951, yes.

Q. Do you remember who asked you to make that copy?

A. If I remember right, I believe it was either Mr. Hatfield or Mr. Titus.

Q. Did you make such a copy?

A. Yes, I did.

Q. I will show you——

Mr. Garrison: You were furnished this, Mr. Bronson.

Mr. Bronson: Is it the same as the others?

Mr. Garrison: No. The one you have has a different heading to this. This is a copy of the file that she made.

Mr. Garrison: I show you a typewritten, clamped-together series of statements, and ask you if you know what that is?

A. This is the teletype file that I typed up at the time in November at the request of Mid-States.

Q. And does that contain all of the teletype messages that were in the file when you typed them up?

A. All the ones that were in the file at the time I typed them up, yes.

Q. Can you tell whether, by looking at this, there were teletype messages—that teletype messages were received in the Lotz office while you were employed there which are not in the file? [1007]

(Testimony of Martha Keyes.)

A. I would like to say this, there is one place in here I do notice that I made a comment to that effect; but there are many places—I can't point them out specifically, but at the time, I remember the typing, I knew there were other messages, but I couldn't be sure at that time.

Q. When you typed this up at the request of Mid-States officials, did you have a conversation with any of them and Mr. Smead regarding the absence of certain messages? A. Yes.

Q. Will you tell us when that occurred?

A. That was a conversation at the time I was typing it up, and because of my concern because I didn't have all the messages.

Q. Just a minute. I haven't asked for the conversation. A. Oh.

Q. Where did that occur?

A. 315 Fourteenth Street, in the office.

Mr. Bronson: I can't hear the witness.

Mr. Garrison: "That was at 315 Fourteenth Street, in the office."

Mr. Garrison: Q. And one of the gentlemen from Mid-States was there and Mr. Smead was present? A. That is right.

Q. Anyone else?

A. I believe that Mr. Hatfield was there. I am not sure, but [1008] I think Mr. Oldberg was there.

Q. What was said by each of you?

A. At first there was a conversation between myself and, I believe, Mr. Hatfield and Mr. Oldberg. I wanted to know if there was any way I

(Testimony of Martha Keyes.)

could get the rest of them to make a complete file.

Q. What was done?

A. I believe that that was during the time Mr. Smead and Mr. Lotz had taken offices downstairs, although they hadn't officially moved down. But at any rate I was trying to get them, and they had Ralph Smead up to the office.

Q. Did they do that?

A. They did, yes.

Q. And he came up where you were?

A. He came upstairs, yes.

Q. Did you have a conversation?

A. Yes. They asked and I asked him——

Q. Just what was said?

A. I asked where the messages were that I had asked him about previously, that I wanted to complete the file, and he denied at first knowing what I was talking about. He then admitted he guessed he had lost them.

Q. Then you did type whatever messages were in the file?

A. I did type what I could, yes.

Q. I will show you Plaintiff's Exhibit 29, which has been [1009] identified as containing all of the messages that could be found either in the Lotz office or American Fidelity's office, and ask if you can tell us—you may take this copy if you wish—ask if you can tell us whether or not the first document that you refer to as being a copy of your typing contains fewer messages than the one that I have handed you?

(Testimony of Martha Keyes.)

A. Oh, it does contain a different amount, yes.

Q. In other words, can you tell from looking at these that there were a number of messages out of the file from the Mid-States teletypes?

A. Quite a number, yes.

Mr. Garrison: Cross examine.

Cross Examination

Mr. Bronson: Q. Mrs. Keyes, by whom are you now employed?

A. I am employed by Insurance Brokers Witthoft and Farley in Oakland. Would you like the address?

Q. No, that will do, as far as I am concerned.

One of your duties was mail clerk?

A. I would open the mail as it came in in the morning, yes.

Q. Was that a duty you had during the period of your employment with Mr. Lotz?

A. Yes, I always opened the mail, yes. [1010]

Q. You said you were employed up to around February of 1952?

A. The 27th of February was my last day in that office.

Q. At the 14th——

A. At the 14th Street address.

Q. What was that date in February?

A. 27th of February.

Q. And you were being paid by whom during the period of your employment in 1952? That would be January and February.

(Testimony of Martha Keyes.)

A. From January 1st to the 27th of February, my salary check was from Mid-States Insurance Company.

Q. Who was in charge of the office during that period of time?

A. Mr. Oldberg was, in January. Mr. Oldberg continued during February. He was in and out of the office constantly, but he was in charge.

Q. Was Mr. Hatfield there at any time during those months?

A. Intermittently he was there.

Q. Intermittently? A. Yes.

Q. At what intervals or times would you see Mr. Hatfield?

A. We would see him for a week, maybe three weeks, and then he would be gone two weeks, and then he would be back for another week.

Q. And the situation regarding Mr. Hatfield and his appearance [1011] there in your office in Oakland did extend from sometime in November, 1951, is that right?

A. That is right. Mr. Hatfield was in the office at that time.

Q. Roughly, over a period of three months or more?

A. Oh, close to four, three and one-half.

Q. Yes. Now, the incident you recounted when Mr. Lotz' business was downstairs and the Mid-States had an office upstairs—Am I correct in that description?

A. As I said before, Mr. Lotz and Mr. Smead

(Testimony of Martha Keyes.)

moved downstairs—they didn't move downstairs officially until the first of January, although they had taken a space before that time.

Q. And it was after that that this incident occurred when you say Mr. Smead was called upstairs from the downstairs office, that is, upstairs into the Mid-States area, and inquiry was made about the teletypes, is that right?

A. That is right. So far as the girls in our office knew, Mr. Smead was still our employer in November.

Q. But I say the incident of Mr. Smead and questioning him about some teletype messages that were lost, or at least weren't in your file, that occurred sometime in January after the separation of the offices had occurred, am I right in that, Mrs. Keyes?

A. No, sir, it was in November.

Q. How do you fix that date? [1012]

A. Because it was at the time that I was typing this teletype book from the messages and that was in November.

Q. Well, did that conversation take place upstairs?

A. It took place upstairs near my desk.

Q. Oh. Well, I just don't know what the significance of it is, but had you lost teletypes before that?

Mr. Garrison: I move Counsel's statement about whether he knows the significance of it or not be stricken out as a voluntary statement, not a question, and self-serving.

(Testimony of Martha Keyes.)

Mr. Bronson: I don't intend to be self-serving here, Your Honor. All I am getting at is, if the lady will remain here while some other witness is called, maybe she can be recalled for further cross examination.

The Court: Reframe your question.

Mr. Bronson: I will withdraw the question, if the Court please.

Mr. Bronson: Q. You say Mr. Smead first denied knowing anything about it?

A. At first Mr. Smead was hesitant and said—In fact, I can almost say exactly what he said. He said, "I don't know what you mean. I don't know about any messages," and I said, "Why, you do remember, Ralph, it was a couple of months ago when we talked about them when you took them out of the file."

"Oh, those," he said, and I said, "All right, now do you remember?" [1013]

And he said, "Oh, I guess I must have lost those," and he laughed and walked away.

Q. Did it appear to you there was any significance in his remembering it after you reminded him?

A. No, sir, there was no significance.

Q. You stated that the other incident when he was on the telephone on a connection that you had made and transferred to him on a New York call, that you laid your entire file of teletypes on his desk?

(Testimony of Martha Keyes.)

A. Took the folder out of the desk and took it over to him.

Q. Did you have teletype messages with any other concerns than American Fidelity—I mean the American Plan?

A. I believe it was just the American Fidelity—Well, American Plan, American Fidelity and Casualty. It was the AFC Operator we used to send messages to and receive messages from.

Q. You were supplied with a book for the entire United States of concerns in each city and state that have teletype machines, were you not?

A. Yes.

Q. Did Mid-States have a teletype in their office?

A. I don't think—I don't remember that. I can't remember. I don't think we ever teletyped them.

Q. Did you teletype any place else besides—

A. (Interposing) I would like to make it clear, I wasn't [1014] the operator all the time. I know how to operate it. We did have another girl that sent and received most messages.

Q. But you don't know whether Mid-States had a teletype connection or whether your concern—

A. (Interposing) I don't think so. I don't remember them having one, no.

Q. You will remain in the courtroom during the morning, will you, please? A. Surely.

Mr. Bronson: That is all, thank you.

(Testimony of Martha Keyes.)

Redirect Examination

Mr. Garrison: Q. I have one more question:

Mrs. Keyes, were you contacted by anyone representing the defendants in this case before I called you?

A. Yes, Mr. Tiedeman telephoned me at the office one day.

Q. And did he discuss your experience with the Lotz Agency with you on the telephone?

A. Yes. His questions were regarding the correspondence file.

Mr. Garrison: That is all, thank you.

(Witness excused.)

Mr. Garrison: I would like to ask, if the Court please, that this transcript of teletypes that is certified as being those she made be received in evidence as Plaintiff's Exhibit [1015] next in order.

The Court: They may be admitted and marked, Plaintiff's Exhibit next in order.

(Whereupon transcript of teletypes referred to and described above were received in evidence and marked Plaintiff's Exhibit No. 39.)

JANICE S. HOWARD

a witness called on behalf of the plaintiffs in rebuttal, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: State your full name and occupation to the Court.

The Witness: Janice S. Howard, housewife.

Direct Examination

Mr. Garrison: Q. Where do you reside, Mrs. Howard? A. San Lorenzo.

Q. Do you have a larger voice volume, Mrs. Howard? Can you speak up so we will be sure to hear you? A. I shall try.

Q. Are you employed?

A. Not presently.

Q. Were you during the year 1951 employed by Mr. Lotz? [1016] A. I was.

Q. What were your duties?

A. I worked in the accounting department, specifically with receivables.

Q. Did you have to do with posting the books and taking care of entries involving receivables?

A. Yes. The actual accounts were posted by machine, by an operator.

Q. I see. And who was in charge of your department? A. Faye Roach.

Q. Receivables, do you mean—. What do you mean by "receivables?"

A. The policies. The receivables from our agents.

Q. Balances due from sub-agents?

(Testimony of Janice S. Howard.)

A. That is right.

Q. Do you recall in August of 1951, Mr. Hart being at the Lotz Agency?

A. Yes, I do.

Q. You do know Mr. Hart, do you, as being President of the American Plan? A. Yes.

Q. Did you receive a request at the time he was around the Lotz Agency in August for some figures?

A. Yes.

Q. And from whom did you receive the request?

A. From Ralph Smead.

Q. And what did you do as a result of that request?

A. We taped the agents' accounts receivable for the outstanding American Fidelity.

Q. What do you mean, you "taped" them?

A. We ran a tape on the outstanding figures.

Q. And did you complete that?

A. Yes, we did. As I recall, it was recapped.

Q. Then turned it over to someone?

A. To Faye.

Q. To your——

A. Head of our department.

Q. To your immediate employer?

I show you a tabulation on American Fidelity and Casualty Company stationery, and ask you if that represents—if that is a copy of the tabulation that you made at that time? I take it a "tab" is an abbreviation of "tabulation"?

A. That is correct.

(Testimony of Janice S. Howard.)

Q. Do you recall how long it took you to do that?

A. I don't believe we worked on it constantly. I would say over a period of two weeks. We still kept up our current work.

Mr. Bronson: Could I have that repeated, please?

The Witness: I don't believe we worked on that steadily, so I would say over a period of two weeks these figures *were* [1018]

Mr. Garrison: Q. Ignoring the handwritten material at the bottom, just calling your attention to the typed material, can you tell us if that is a copy of the receivables that you made up?

A. I would say yes, it was.

Q. And this a document consisting of one-half page on Page 1 and Page 2?

A. You are right.

Q. And now I will show you Plaintiff's Exhibit 22, which is a handwritten statement of two pages dated 12/18/51, and ask if you recollect having ever seen that before?

A. Yes, it is a statement that we witnessed for Mr. Smead.

Q. At the request of whom?

A. Mr. Smead. [1019]

Mr. Bronson: What exhibit is that?

Mr. Garrison: Plaintiff's Exhibit 22. I would like to read this, if I may, so the witness will have it in mind:

(Testimony of Janice S. Howard.)

“Joseph Lotz Insurance Agency, 12/18/51.

“During day of August 20th, 1951, while Mr. Mark Hart was in Joe Lotz’ office I was asked to furnish him with the following information:

“Total premiums payable to Co.’s.

“Total receivables.

“I spoke with our bookkeeping department in the presence of:

“Mrs. Janice Howard

Miss Lyla Bowman

Miss Faye Roach.—”

Do you recall, that is the conversation you mentioned?

“and a tape was run to furnish the above requested information. To the best of my recollection the below figures are approximately correct:

“Total premiums payable \$287,000.00

“Total receivables \$75,000.00.

“The following day, August 21st, 1951, I was asked to compile a listing by policy number, name of insured, amount of premium, and by individual agents, the unpaid American Fidelity and Casualty Company accounts receivable. This information was [1020] compiled by Miss Roach and Miss Bowman of this office, and I believe that the figure below is the approximate total amount, by agents, of American Fidelity and Casualty Company receivables:

“Total AF&C receivables—\$51,000.00.

Signed “Ralph L. Smead.”

And at the bottom, dated 12-18-51, there is in this record:

(Testimony of Janice S. Howard.)

“The undersigned recall incidents set forth in the above statement of Ralph L. Smead with the exception to verification of amounts involved.”

That is signed “Faye Roach, Lyla May Bowman, Janice S. Howard”.

Mr. Garrison: Q. That is your signature?

A. It is.

Q. And do you recall the circumstances surrounding the preparation of this statement?

A. Yes, I remember when we were asked to do it and my part in doing it.

Q. Where was it?

A. 315 Fourteenth Street.

Q. At the Lotz office? A. That’s right.

Q. Who asked you for it?

A. Ralph Smead.

Q. And that was on the date indicated, December 18th? [1021] A. Yes.

Q. As I take it, you didn’t have any personal contact with Mr. Hart? All you did was follow instructions given you by your superior, Miss Roach?

A. That is correct.

Q. And when your work was completed, you handed it to her? A. That is right.

Q. Did you have any instructions while you were working from anyone as to when you were going to get it out, or how soon you were going to get it out, or anything of that kind?

A. Not that I recall.

Mr. Garrison: Cross examine.

(Testimony of Janice S. Howard.)

Mr. Bronson: I am going to put the document in evidence if you have the figures on.

Mr. Garrison: Let's offer it. I will ask that this be received as plaintiff's exhibit next in order.

Mr. Bronson: Whose does it appear to be? Plaintiff's?

Mr. Garrison: Yes.

Mr. Bronson: It was filed on your desk, counsel, until I asked for it.

Mr. Garrison: Well, I overlooked putting it in. I don't think it is of any importance who puts it in.

The Court: Let it be marked in evidence.

(Whereupon document previously marked Plaintiff's Exhibit 40 for identification, "Recap of [1022] American Fidelity Unpaid Items", was admitted into evidence as Plaintiff's Exhibit No. 40.)

Cross Examination

Mr. Bronson: Q. This may be a little repetitious, but with regard to Exhibit 40, Mrs. Howard, have you ever seen that before today?

A. No, I haven't; not since it was prepared.

Q. Well, you saw it, then, when it was prepared?

A. Yes.

Q. When was it prepared with reference to the time Mr. Hart was out in Oakland in August of 1951?

A. I would say it was prepared some time between August and December, 1951.

Q. Some time between August and December, 1951? And without pressing the matter any fur-

(Testimony of Janice S. Howard.)

ther than this, is that exhibit accurate as to the place and the time when the data that had been gotten together was compiled into this page?

A. Yes, it is. I don't recall the exact month or day.

Q. You did say, I believe, it took two weeks to get it together?

A. I would say that is about the time.

Q. Counsel has referred——

Mr. Bronson: I am not going to take time, Your Honor, to hand this up to you. I don't think it is necessary for my [1023] cross examination. But it has on each of its two pages, two columns of names of individuals or companies, and opposite each name in the two columns on each page is a figure representing money.

Mr. Bronson: Q. Is that right?

A. Yes.

Q. And have you any explanation why in the preparation of this exhibit the first page only goes halfway and leaves room for a pen and ink subscription, and in the second page it runs clear down? A. No, I don't.

Q. Who actually types up this exhibit?

A. That I don't know.

Q. Where is the original of it, this being obviously a carbon? A. I don't know.

Q. I don't know whether you were asked, but I would like to get the information in any event: When did you go to work for the Lotz Agency?

(Testimony of Janice S. Howard.)

A. I believe it was in June, first part of June, first week in June of 1951.

Q. To what date did your employment either for the Lotz Agency or the successor to it, Mid-States Insurance Company, extend?

A. 23rd of December.

Q. Of 1951? A. Correct. [1024]

Q. Where is Faye Roach now, if you know?

Mr. Garrison: She will be here at eleven o'clock, Mr. Bronson.

Mr. Bronson: All right.

Q. Can you explain the circumstance that Exhibit 40 is undated? A. No, I cannot.

Q. Can you explain the circumstance that the document contains no reference to the date as of which these figures apply, whether in June, July, August or any other month or day down to the end of December, 1951? A. No, I can't.

The Court: "No, I can't", you say?

A. (Nodding in the affirmative.)

Mr. Bronson: Q. This does not purport to be—. Well, I will ask you first, this is supposed to be the account of receivables due from these people whose names appear or companies whose names appear on the exhibit? A. Yes.

Q. And it doesn't purport to state to which companies or company accounts, if those mean due to the company, insuring company, the figure applies?

A. It doesn't state on that list, no.

Q. No. Did you assist in the preparation of the

(Testimony of Janice S. Howard.)

figures that are represented on this Exhibit 40?

A. Do you remember how many agents by number are represented here? A. No, I don't.

Q. I made a rough calculation of something like 125. Would that be about right in your recollection of the general number of names that appear on Exhibit 40?

A. I believe that would be approximately correct.

Q. Are they all sub-agents of the Lotz General Agency? A. Yes.

Q. Referring to Exhibit 22—I think I don't need to bring it up, but you can ask for it if you wish it. That is the document that has your signature on the second page of it that Mr. Garrison read a moment ago.

When did you prepare the figures represented by the items "Total Premiums payable \$287,000.00; total receivables \$75,000.00?

Mr. Garrison: That is objected to on the ground, if the Court please, she said she didn't prepare those figures and doesn't even attempt to verify them. The document, Mr. Bronson, I think will clear that.

Mr. Bronson: You are referring to the subscription just above their names?

Mr. Garrison: Yes.

Mr. Bronson: I didn't interpret it that way.

Mr. Garrison: She only worked on receivables, she said.

Mr. Bronson: I didn't interpret it that way and

(Testimony of Janice S. Howard.)

I would [1026] like to pursue it. Withdraw the last question.

Q. Now, when you subscribed the statement in the little subscription at the end——

Mr. Bronson: If I may step up to the witness, Your Honor?

Q. “The undersigned——”

Help me out with that?

A. “——recall incidents set forth in the above statement.”

Q. “The undersigned recall incidents set forth in the above statement of Ralph L. Smead with the exception to verification of amounts involved.”

You meant by that a bookkeeping verification by getting in touch with the individuals involved in receivables and in payable items direct; that is to say, an accountant's or a bookkeeper's meaning of the word “verification”?

A. I don't believe I understand the question exactly, but——

Q. I am simply asking you if it isn't a fact, when you said, “with the exception of verification of the amounts involved”, you meant——

A. (Interposing) It would not be exact to the penny or dollar.

Q. Yes. But you did get some data to go on, had some information on the subject of the items, “Total premiums payable \$287,000.00; total receivables \$75,000.00”?

A. Not the payables. I had nothing to do with payables.

(Testimony of Janice S. Howard.)

Q. Then let's take receivables. You didn't verify them in [1027] the manner you would check with a bank to see what the deposit is?

A. No.

Q. But you had some information. I want to know when you got that together. Was it on December 18th or some later date?

A. No, it wouldn't have been a later date. It would have been about December 18th.

Mr. Bronson: That is all.

Redirect Examination

Mr. Garrison: Q. As I understand it, Mrs. Howard, you didn't type this yourself?

A. No, I didn't.

Q. You ran a tape and gave the taped material to your superior, and whoever typed this was somebody you didn't have any connection with?

A. That is right.

Q. All you know is that this appears to be the list of agents' balances you ran the tabulation on?

A. That is correct.

Q. You did give us the date when you ran the tapes, and they commenced when Mr. Hart was out there?

A. That is correct.

Q. And you are not sure when you completed it?

A. No, I am not. [1028]

Mr. Garrison: That is all.

The Court: You may step down.

(Witness excused.)

ALFRED R. MARKS

recalled as a witness on behalf of the defendant, having been previously sworn, testified further as follows:

Direct Examination—(Continued)

Mr. McKinnon: Q. Have you prepared an adjusted balance sheet as of November 30, 1951, which we spoke about yesterday?

A. Yes, I have.

Mr. McKinnon: We offer this in evidence, if the Court please.

The Court: It may be admitted and marked.

(Thereupon document entitled "Joe Lotz doing business as Joe Lotz Insurance Broker and General Agent, Balance Sheet, November 30, 1951" was received in evidence and marked Defendant's Exhibit S.)

Mr. McKinnon: Q. I have only one more question to ask of this witness:

Mr. Marks, in your examination of the Lotz Agency books did you find any evidence of incorrect balances of accounts receivable?

A. Yes. There were entries during the period from April, 1951, through August, 1951, almost monthly if not monthly, in which [1029] sizeable adjustments were made to the control account for agents' balances to bring it into agreement with detail accounts.

Mr. McKinnon: That is all.

(Testimony of Alfred R. Marks.)

Cross Examination

Mr. Garrison: Q. Mr. Marks, do you have your exhibits with you? A. Yes, I do.

Q. Referring to Exhibit 2——

A. Yes, sir.

Q. Column 2 says, "Cash available including operating and petty cash". Was that a figure that was taken from the books as of a given day?

A. As of the end of the month referred to, Mr. Garrison.

Q. In other words, that represents the balance in the account at the end of the month?

A. That is right.

Q. And it doesn't purport to show any of the in-and-out transactions through that month?

A. No, it does not.

Q. Doesn't purport to show how much money was in the account during the month?

A. No, it does not.

Q. Column 3, "Premiums payable to all companies per Lotz General Ledger", did you have in mind and take into account the [1030] 60 or 75-day credit period in that column?

A. Well, this is the amount of the liability reflected in the accounts as a result of the periodical postings as the cash came in from the agent to reflect the liability. It has nothing to do with credit period.

Q. These are cash receipts?

A. That is right. In other words, that is the

(Testimony of Alfred R. Marks.)

amount owed to the company as the result of collections from the agent.

Q. But it doesn't purport to say that those sums were necessarily payable as of the date shown?

A. No, it does not.

Q. In other words, he may have collected a thousand dollars on the 15th of the month but not owed it to the company until the 30th of the month?

A. That is right.

Q. Now, the last two columns, "Amounts due Mid-States per their records", and the second from the last column on the right, that is the amount due Mid-States also as of a given date?

A. That is right.

Q. And you don't—it isn't your purpose to relate the amount due Mid-States to these other columns, necessarily, is it?

A. No, except with respect to the last column. The balance at that time is fairly comparable to the balances, premium [1031] balances payable to all companies as of the same day.

Q. But that was somewhat of a coincidence?

A. Not necessarily, Mr. Garrison.

Q. Actually, for the most part the two are unrelated. They cannot be related because, in the first place, the cash figure is taken as of an arbitrary day and the balances are likewise taken as of an arbitrary day.

A. Well, except for the fact that the column—the balance in the column, the last column, "Amounts

(Testimony of Alfred R. Marks.)

due Mid-States", is comparable to the balance at the end of the month per Lotz' records.

Q. Sure. That is what was due Mid-States as of the end of the month?

A. With respect to that particular month's transactions.

Q. Sure, that is right. But that's still unrelated to the amount of cash he might have in the bank at the end of the month?

A. It's unrelated as far as the cash is concerned, yes.

Q. Now, going to Exhibit 6——

Mr. Bronson: Schedule 6, you mean?

Mr. Garrison: Schedule 6.

Mr. Bronson: That would be Exhibit L.

Mr. Garrison: I am referring to this batch of exhibits, Exhibit L. Were they all introduced as one?

Mr. McKinnon: No, they were not. They are all separate.

Mr. Bronson: The first one, Mr. Garrison, so the record [1032] will be straight, the one you have been questioning on, is Exhibit J.

Mr. Garrison: Q. The one we were just talking about is Exhibit J—Defendant's Exhibit J.

The Witness: A. Yes.

Q. Now, the one I want to talk about is Defendant's Exhibit L. This is "Cumulative totals of earned premiums and loss ratios on Mid-States business, September 1, 1951, through December 31,

(Testimony of Alfred R. Marks.)

1953.”, and you strike averages, cumulative totals, do you not? A. That is correct.

Q. I want to call your attention to the months of November and December of 1951. Do you find that? A. Yes.

Q. What were the month's loss ratios by Mid-States on the business of their books as of those two months?

A. You mean the loss ratio for that particular month?

Q. For that particular month.

A. For the month of November, 1930, for that month only, the loss ratio was 105.71.

Mr. Bronson: Excuse me, you say November, 1930?

Mr. Garrison: Q. You mean November 30th, 1951? A. Right.

Q. And for December 31st, 1951?

A. For the month of December, 1951, the loss ratio in that [1033] month, for the month's computation only, was 103.41 per cent.

Mr. Garrison: Q. Now, subsequent to that date did you find any month in which the loss ratio was that high except the one month down in 1953?

A. No, Mr. Garrison.

Q. As a matter of fact, in January the loss ratio was 30.32—January, 1952? A. Yes.

Q. March, 39.49? A. Yes.

Q. Were you able to tell from your audit of the books that this high loss ratio in November and December, 1951, had any relation to the Public

(Testimony of Alfred R. Marks.)

Service business and the business that they got from the American Fidelity and Casualty Company? A. No, I was not, Mr. Garrison.

Q. You know, as a matter of fact, that they had that business, or some of it, on their books during those months, do you not?

A. Yes, some of the business had been recorded on its books.

Q. Yes. And you know, as a matter of fact, it was all cancelled shortly thereafter, as reflected on the loss records subsequent thereto?

A. Cancellations were——

Q. Yes. A. May I finish my answer?

Q. Certainly. [1034]

A. Large cancellations were reflected in the books in February, 1952.

Q. All right. A. May I finish?

Mr. McKinnon: Will you please let him finish? That is the second time. Please let him finish.

A. However, I had no indication from the records that I saw that specifically identified the Public Service business.

Mr. Garrison: Q. That is what I thought you said before. Now, the averages that you strike here, or the cumulative totals have in them, of course, the high loss ratios in the periods we have referred to? A. That is right.

Q. And you have no way of knowing, of course, what their loss ratio might have been had they not cancelled the Public Service and the American Fidelity business as they did at the end of 1951?

(Testimony of Alfred R. Marks.)

A. Public Service and American Fidelity?

Q. That's right.

A. This only deals with the Mid-States business.

Q. The business that they received from the Public Service, relying on the American Fidelity and Casualty Company.

A. Oh, I understand. I don't know, sir.

Q. It's a reasonable assumption, isn't it, that had they kept the business on the books and not cancelled it, their loss [1035] ratio might have continued for the subsequent months in the same approximate ratio as it had in November and December?

Mr. McKinnon: I will object to that question, if the Court please, as calling for an assumption.

Mr. Garrison: Very well, I will withdraw it. I think it is clear enough. I suppose it is too much to assume.

Q. Now, referring to Defendant's Exhibit O, Schedule 9, this you say is a computation of funds, exclusive of Mid-States premiums, available for settlement of account with American Fidelity and Casualty Company, December, 1950 to November, 1951.

I take it that in part this is a theoretical exhibit?

A. This exhibit was prepared on the basis of instructions from Mr.——

Q. (Interposing) Regardless of who told you to do it, the fact is that the exhibit makes certain arbitrary assumptions and to that extent is a theoretical exhibit? A. Yes, sir.

(Testimony of Alfred R. Marks.)

Q. Certainly. Now, in making these computations you took the net premium funds, which were collected by Lotz on AFC policies after commissions to sub-agents? A. That is right.

Q. You struck that off as \$225,914, right?

A. That is right.

Q. And then you made a total of the funds remitted to the American Fidelity and Casualty Company by Lotz and/or sub-agents [1036] at two sixty five nine? A. That is right.

Q. Did you give any effect in those two totals of the cancellation and rewrite of \$61,000 of business that was taken from American Fidelity's books and put on the books of the Mid-States Insurance Company?

A. No, that wasn't a cash transaction insofar as here, and could not be determined.

Q. Yes, I admit there was no cash involved in it. But didn't Mr. Lotz receive the commissions on that business when he wrote it in the first instance in the American Fidelity and Casualty Company?

A. Yes. From the viewpoint of the commissions earned on the business originally written. I am not sure whether it would be in this period, Mr. Garrison, but I think it would be because this is the period covering the entire operation.

Q. This represents the total period?

A. That is right.

Q. In which Lotz and the AF&C had any business transactions? A. That is right.

(Testimony of Alfred R. Marks.)

Q. So that if he wrote this \$61,000 of business in the AFC Company in the beginning, there would have been a commission to him, wouldn't there?

A. That's right.

Q. And you didn't include that in your total?

A. The commission is in here.

Q. Is in——

A. (Interposing) In other words, if the commission—to the extent that such commission was earned by Lotz—and remember the commissions were credited to him on an earned premium basis—if that commission was earned by Lotz and paid to him it would be included in the commission and other income from all sources.

Q. All right. Now, then, in the latter part of 1951 that \$61,000 of business was removed bodily from the liability column of the American Fidelity and Casualty Company, wasn't it?

A. That is right.

Q. And to that extent they received, in effect, payment for \$61,000 worth of business because they lost the liability?

Mr. Bronson: That calls for a conclusion, Your Honor.

Mr. Garrison: He is an expert. He can give his conclusion.

Mr. Bronson: "Theoretical", counsel says.

Mr. Garrison: In other words, they had removed from their liabilities——

The Witness: A. Removed the necessity for collecting sixty one thousand.

(Testimony of Alfred R. Marks.)

Q. And that was just the same, so far as their account was concerned, as if they had been paid sixty one thousand?

A. So far as their account was concerned, it would reflect a net balance position the same as though the cash had been [1038] remitted.

Q. A transaction favorable to them to the extent of \$61,000 liabilities?

A. The liability of the Lotz Agency to American Fidelity was reduced by \$61,000.

Q. Could have been accomplished by the payment of cash as easily as by the removal of the liability?

A. It would have had the same net effect.

Q. Would have had the same net effect. But you don't show that in this tabulation.

A. No, I do not.

Q. The first column you refer to as "Net premium funds collected". That would include the premiums that Lotz wrote on that \$61,000 worth of business, that he wrote and placed in AFC, didn't it?

A. If all receivables were collected from the agent, it would be so included.

Q. Well, we assume——

A. (Interposing) Well, I can't assume it, Mr. Garrison, because I know that that is not the fact. Not all agents' balances were collected.

Q. Well, if he collected it, it would be in here?

A. That's right.

Q. So that you have in effect by this exhibit

(Testimony of Alfred R. Marks.)

shown him with the receipts of all premium income collected? [1039] A. That's right.

Q. But you did not give him credit for the \$61,000 of business that he was able to remove from the American Fidelity and place in the Mid-States?

A. It wasn't a cash transaction, sir.

Q. But by this exhibit you are purporting to show the computation of funds, exclusive of Mid-States premiums, available for settlement of account of the American Fidelity? That is what you are attempting to show?

A. That is right.

Q. And you show all premium collections, and yet you do not credit him with the \$61,000 of business that he took off and gave to the Mid-States?

A. That \$61,000 as an element is not included in the schedule.

Q. Isn't that only 50 per cent, then, of his account with American Fidelity, to that extent?

A. I don't know what you mean by 50 per cent, Mr. Garrison.

Mr. Garrison: That is all. Wait, one more second.

Q. Referring to Defendant's Exhibit P, Schedule 12, page 2. This is a statement which you say is, "American Fidelity and Casualty Company with Joe Lotz Agency, Statement of Account, January 1, 1951 to March 31, 1954", and I believe you show a balance due American Fidelity here of \$840.50.

A. That is right.

(Testimony of Alfred R. Marks.)

Q. Well—— [1040]

A. Only with respect to the premiums, Mr. Garrison. That is what this schedule shows.

Q. Well, don't you give him any credit for his earned commissions?

A. No. This is only an accounting for premiums. I didn't—this does not purport, this particular schedule does not purport to show the complete account or all accounts with Lotz. This is only the account——

Q. (Interposing) This just shows what Lotz owes to AFC but doesn't show what AFC owes Lotz.

A. This is only an accounting for premiums.

Q. What would it show if it showed the other half of the picture, what AFC owes Lotz?

A. Well, if this schedule—if I were asked to show a complete auditing with the Lotz Agency of all transactions, then probably the commission element would enter into it.

Q. Who asked for this exhibit?

A. Counsel for AF&C.

Mr. Garrison: That is all.

Redirect Examination

Mr. McKinnon: Q. The purpose of schedule 12, about which you have been last interrogated by Mr. Garrison, was, as I take it, to show the accounting of the premiums by Lotz to American Fidelity and not the full statement of the account? [1041]

A. That is right.

(Testimony of Alfred R. Marks.)

Q. Including whatever may have been owed back to him by way of commissions, is that correct?

A. That is right.

Q. Now, with respect to Schedule 9, about which he has also put some questions to you, this schedule is limited to cash transactions, is it not?

A. That is right.

Mr. McKinnon: That is all.

Cross Examination

Mr. McCallum: Q. Mr. Marks, I assume that in reviewing the records of Mr. Lotz you looked at his check book, did you not? A. Yes.

Mr. McKinnon: If the Court please, I thought this was the last time we would have to go through the formality of my registering my objection to the questions of Mr. McCallum because of lack of foundation for any questions in view of their theory of the case, and ask that the objections run to the entire line of questioning. I hope I won't have to bother Your Honor any more.

The Court: Let the record so show.

Mr. McCallum: Q. And I assume also, Mr. Marks, you looked at the deposit slips among his records? [1042]

A. I am not sure that they were examined, but I think that they were. A lot of this detail work was done by men under my supervision and I would have to refer to my papers to find out.

Q. Now, do you know whether or not the men

(Testimony of Alfred R. Marks.)

you asked to prepare the work that you asked them to do did look at the deposit slips?

A. I am not sure about the deposit slips, Mr. McCallum. I do know that they looked at the check book.

Q. You were advised, were you not, the Public Service monies were a factor in this case, in the course of your examination of his books and records, weren't you?

A. I knew that there was some mention of the Public Service transactions in this case, yes, sir.

Q. And in the course of your investigation, did you not look through Mr. Lotz' records to see what happened to those monies?

A. Well, we made a review of the cash transactions during the period of September 1 down to date in the trustee bank account and in connection with that there was some reference to the Public Service transactions, yes.

Q. Then it's true you did see checks were made payable to the Mid-States Insurance Company and deposited in Mr. Lotz' trustee account, didn't you, in connection with Public Service?

A. I had no way of knowing that the checks were made payable to Mid-States. I saw some deposits reflected in the check book. [1043]

Q. All right, then, my question should be that you did see deposits made in the trustee account of Joe Lotz in connection with premiums received in connection with Public Service matters?

A. I can only assume they were Public Service

(Testimony of Alfred R. Marks.)

matters, Mr. McCallum. We had no indication in the books themselves, in the checkbooks—in the bank statements that we examined. There was no identification of the amounts. But in relating them to the check book, which does give that relativity, why, then, I must assume that the figures contained in the bank statements we examined were settlements on account of Mid-States transactions—Public Service transactions. [1044]

Q. Well, you recall seeing a deposit made involving the check for \$67,500.00 from Public Service, don't you?

A. There was such a transaction reflected in the bank statement and check book.

Q. Now, do you recall at the time that that deposit was made, that sum of that deposit was for about \$68,811.84?

A. I would like to refer to some of my papers, Mr. McCallum.

Q. I say, you found a deposit having been made of \$68,811.84?

A. I don't have a record of the deposits themselves in my working papers, but there are entries, in a schedule that I have recording transactions in the trustee account which are apparently the detail of the transaction you refer to.

Q. Then is it correct, Mr. Marks, that you don't know about the deposit of some \$68,000.00 and what went into that deposit?

A. Well, I know that the cash receipts book reflects on September 14th entries of cash receipts on

(Testimony of Alfred R. Marks.)

account of Public Service transactions, which includes one item of \$67,500.00.

Q. Then your records and your investigation found that on that date, September 14th, of the sixty eight thousand odd dollars deposited some \$67,500.00 came from Public Service?

A. That is right.

Q. Now, on September 14th, and as a result of that deposit, Mr. Marks, how much money was there then in the trustee account of Joe Lotz? [1045]

Mr. McKinnon: If the Court please, in the interests of time, as I recall it the entire set of transactions now being inquired into is in evidence in documentary form. This witness is a mere accountant being asked to verify what he found, and I believe it has already been found and placed in evidence. I wonder if there is any relevancy.

The Court: Maybe you can get a stipulation from counsel in relation to the matters you are inquiring about.

Mr. McCallum: Are you prepared to stipulate, Mr. McKinnon, that on the date the check for \$63,000.00 on September 15th was made and sent to American Fidelity, that the total deposits in that account was \$74,472.99.

Mr. McKinnon: No. I am prepared to say, as I have already said, that I think the routing of monies has already been most thoroughly established by photostats of accounting records in the case, and this witness, being a mere accountant, is merely being asked to verify what he found in those state-

(Testimony of Alfred R. Marks.)

ments. I see no purpose in it except that valuable time is being consumed.

Mr. McCallum: It is preliminary, Your Honor, that if we can reach the conclusion from this witness that as a result of his examination of the records, he found premiums were received in connection with the checks in which the Anglo Bank was involved which were due and payable Mid-States Insurance Company—— [1046]

The Court: Ask him the direct question. Proceed.

Mr. McCallum: Thank you.

Mr. McCallum: Q. I think the question was, did you know how much money he had in the bank account at the time they deposited the \$68,000.00?

A. As a result of the \$67,500.00 going into the account, the balance then became \$74,000.00, approximately.

Q. So that as of September 14th, or 15th, he had \$74,000.00 in the trustee account, of which \$67,500.00 was from the Public Service, is that correct?

A. That is right.

Q. And would you also say that on the day following he sent \$60,000.00 to American Fidelity?

A. There was a check drawn to the account of American Fidelity and Casualty Company in the amount of \$60,000.00.

Q. All right, now, directing your attention, please, to the date of September 24th, did you find at that time a check to American Fidelity in the

(Testimony of Alfred R. Marks.)

amount of \$11,250.00 had been deposited in the trustee account? A. That is right.

Q. In connection with the deposit of \$12,000.00?

A. I can't relate it to the twelve thousand, but I do know about the eleven thousand.

Q. Do those records themselves show what the amount in the trustee account was after the \$11,250.00 Public Service check [1047] had been deposited? A. Approximately \$16,000.00.

Q. Then did you find that on the 26th a check for \$15,000.00 of that \$16,250.00 was sent to American Fidelity?

A. On the 26th a check was drawn in favor of American Fidelity and Casualty Company in the amount of \$15,000.00.

Mr. McCallum: Thank you. No further questions.

Redirect Examination

Mr. McKinnon: Q. Mr. Marks, just one question, please: You made no effort to identify money when you referred to checks being drawn on the Lotz Trustee Account to American Fidelity and Casualty Corporation, do you, as to the source of the funds from which the check is drawn?

Mr. Garrison: Well, if the Court please——

The Witness: A. No.

Mr. Garrison: We submit that is leading and suggestive and almost identifying the witness's answer. The witness testified there went into that account a certain amount of Mid-States money and it went to American Fidelity. Now, if that can't

(Testimony of Alfred R. Marks.)

be identified by that state of facts, then nothing can be. Whether the answer is yes or no, he has said it already.

The Court: Well, that will hardly do.

Mr. Garrison: Well, Your Honor,—

The Court: Let me rule. He may state whether or not he [1048] did as indicated.

The Witness: What was the question again?

Mr. McKinnon: Well—

Mr. Garrison: Can we have it without the leading?

Mr. McKinnon: Yes, I will attempt to reframe it; although my training in leading questions has received some impetus during the course of this trial, if the Court please.

Mr. Garrison: You can thank me for that, probably.

The Court: I always allow for the heat of the moment.

Mr. McKinnon: I thought we were both allowing for Your Honor's long experience in weighing evidence, and taking certain liberties within limits.

The Court: Neither of you gentlemen need apologize for your experience.

Mr. McKinnon: Q. When you refer to a check being drawn on the Lotz trustee account in favor of the American Fidelity and Casualty Company, are you attempting to tell the Court one way or the other whether the funds thus represented are related to any specific prior deposits as with respect to the source of that prior deposit?

(Testimony of Alfred R. Marks.)

A. No, that can't be identified specifically.

Mr. McKinnon: That is all.

Recross Examination

Mr. Garrison: Q. Well, just a minute, Mr. Marks. You said a Mid-States deposit was made of \$67,000.00, didn't you? [1049]

A. I said a check drawn to the order of Mid-States, at least the books indicate as such, for \$67,500.00 was deposited in the trustee account on a certain date.

Q. What date?

A. On the 14th of September.

Q. How much money was in the account then?

A. As a result of that?

Q. No, before the deposit was made.

A. Before the deposit was made there was approximately \$2,000.00.

Q. So then with that deposit and the balance there was \$78,000?

A. That's it. There were other checks came in the same date.

Q. And how much were the other checks?

A. Oh, \$6,000.00.

Q. So we have a total of \$78,000.00?

A. \$74,000.00.

Q. \$74,000.00. Now, when was that check drawn out of there payable to American Fidelity and Casualty Company?

A. The check drawn—I assume you refer to the next check drawn to American Fidelity?

(Testimony of Alfred R. Marks.)

Q. That is \$60,000.00.

A. That \$60,000.00 check was drawn September 15th.

Q. That is the date following?

A. That's the date following. [1050]

Q. And there had to be Mid-States Funds in the \$60,000.00 check because there wasn't enough other money in there, was there?

A. Well, the only thing is that——

Q. Just answer that question.

A. The check——

Q. Answer yes or no?

A. The check for \$60,000.00 was drawn on the day following, at which time there was a balance of \$74,000.00.

Q. And there had to be Mid-States money in that \$60,000.00 check because there wasn't enough money in there to make it up, was there?

A. The \$74,000.00 included \$67,500.00 from Public Service made payable to Mid-States.

Q. Will you answer my question, please?

Mr. McKinnon: If the Court please——

The Witness: A. I can't be more specific than that.

Mr. Garrison: Q. Just answer the question.

Mr. McKinnon: If the Court please, I will object.

Mr. Bronson: He has answered. He said he couldn't be more specific.

Mr. Garrison: Will you read the question, Mr. Reporter? He didn't answer my question. He made

(Testimony of Alfred R. Marks.)

a statement. I want an answer to my question, specifically to the question.

Mr. McKinnon: If Your Honor please, I object to the [1051] question as calling for a conclusion of the witness. The witness is an *account*.

Mr. Garrison: "A mere accountant," he said.

Mr. McKinnon: Well, he is also a human being, and let's treat him as such. He has testified to the influx of money into the *accountant* and withdrawals from the account. To go further involves legal interpretations of the effect of transactions, as counsel well knows, and we should argue that ourselves.

I object to the form of the question as going far afield. The witness has gone as far as any accountant can go in describing the source of funds.

Mr. Garrison: Can I have the question read again?

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

Mr. Garrison: Q. Do you understand that?

A. I understand it.

Q. Is that a fair question?

A. All I can say again, Mr. Garrison—

Q. Just say yes or no, then you can explain it.

The Court: Pardon me. Allow him to answer.

A. All I can say, Mr. Garrison again is that on the day prior to the withdrawal of this check there was a deposit of \$67,500.00, which evidently came from Public Service, which went into the trustee account. As a result of that deposit [1052] there

(Testimony of Alfred R. Marks.)

was \$74,000.00 in the account. After that deposit and after that balance, the next transaction is a check for \$60,000.00 made payable to American Fidelity and Casualty Company, which was drawn on the following day.

Mr. Garrison: Q. And that's as explicit as you can be about whether or not there was any Mid-States money in the \$60,000.00 check payable to American Fidelity?

A. That is the only relationship I can give you on it.

Q. You can't give a yes or no answer?

A. No, sir.

Q. Now, referring to Defendant's Exhibit O—here, I will show the exhibit itself and you can have it before you. A. All right.

Q. In your third from the last column on the right—— A. Yes?

Q. ——you said——

Mr. Garrison: This is the schedule, Your Honor, which shows, presumably, or rather it is purported to show a computation of funds exclusive of Mid-States premiums available for settlement of account with American Fidelity and Casualty Company.

Mr. Garrison: Q. Is that right?

A. That is the title of the schedule.

Q. Now in the third from the—fourth from the right column—— [1053]

A. Fourth or third from the right?

Q. Fourth from the last. You take "Portion of

(Testimony of Alfred R. Marks.)

Operating Expenses and Drawings Allocated to AF and C Operations" and that you make as an arbitrary assessment, I take it.

A. It isn't arbitrary.

Q. Well, based on some formula?

A. May I explain?

The Court: Pardon me. What is it?

The Witness: A. The method of arriving at the figure contained in this column are reflected on page 3 of that schedule, in which we used a formula which is customary to the industry in developing allocations of expenses between departments or between writers of business, and so on.

Mr. Garrison: Q. So that what you did there was to use this formula to allocate and charge to the American Fidelity their proper share of the cost of running the agency, is that right?

A. That is right.

Q. And you found that to be some per cent of the total cost of running the agency?

A. That is right.

Q. Then you deducted that from funds available? A. That is right.

Q. And found that the balance of it was all due and available—or not due, but all available to pay American Fidelity and [1054] Casualty Company's account?

A. For the purposes of the schedule, yes.

Q. I am not talking for the purposes of the schedule. I am talking about that you deducted the portion you charged AFC's business with and then

(Testimony of Alfred R. Marks.)

found that all the funds available remaining—all funds remaining were available to pay AFC's account.

A. That's right. On the theoretical basis referred to in the schedule.

Mr. Garrison: That is right. Step down.

The Court: Step down.

(Witness excused.)

The Court: Take a recess.

(Short recess.)

FAYE PODESTA

a witness called on behalf of the plaintiff in rebuttal, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: State your name to the Court.

A. Faye Podesta.

The Clerk: Will you spell your last name, please?

A. P-o-d-e-s-t-a.

Direct Examination

Mr. Garrison: Q. What was your maiden name?

A. Faye Roach.

The Court: Spell that last name.

A. R-o-a-c-h, unfortunately.

Mr. Garrison: She asked me how you spell your name, Your Honor, when I asked her to come up here.

Mr. Garrison: Q. May I call you Miss Roach for the purpose of this interrogation?

(Testimony of Faye Podesta.)

A. Yes.

Q. No offense, Mrs. Podesta.

Were you employed in 1951 at the Lotz Agency in Oakland? A. Yes, sir.

Q. What was your position there?

A. Bookkeeper.

Q. Were you head of the bookkeeping operations? A. Yes, sir.

Q. How long were you employed?

A. I was hired there June 3rd, I think, 1951, until December, 1951.

Q. And how many girls did you have?

A. Three.

Q. Do you remember in August of 1951, Mr. Hart, the president of the American Plan, coming to Mr. Lotz' office? A. Yes, I do.

Q. And did you see him there?

A. Yes, I did. [1056]

Q. Did you receive a request from anyone in connection with any of the figures involved in Mr. Lotz' insurance operation at that time?

A. You mean in July?

Q. In August.

A. In August, I mean. Yes.

Q. And from whom did you receive the request?

A. Mr. Smead.

Q. Ralph Smead? A. Yes.

Q. And what did he ask you? What did he say to you and what did you say to him?

A. Well, he wanted the outstanding balance of accounts receivable and accounts payable.

(Testimony of Faye Podesta.)

Q. And that would be the sums due from agents to Lotz and the amounts Lotz owed the companies?

A. Yes.

Q. And what did you do after you had that conversation?

A. Well, we proceeded to get the figures for Mr. Smead.

Q. And who was present when he asked you that? A. I am not sure.

Q. Who were the girls employed in the same department there at that time?

A. Miss Lyla Bowman, Janice Howard, and Garnett—I can't remember her last name. [1057]

Q. Janice Howard is the girl that was in here earlier this morning? A. Yes, sir.

Q. Did you speak to those girls regarding this request? A. Yes, sir.

Q. And did you yourself work on the project?

A. Yes, sir.

Q. And what part of it did you work on?

A. I think I worked on both accounts receivable and payable.

Q. And what part did Miss Howard work on?

A. Receivables.

Q. And who worked on the payables other than yourself? A. Mrs. Bowman.

Q. And did you get any instructions or requests from Mr. Smead during the time this work was going on?

A. Well, it was quite urgent.

(Testimony of Faye Podesta.)

Q. Just answer the question whether you got some instructions or requests from Mr. Smead.

A. Well——

Q. Answer that yes or no and then I will ask you what that was. A. Yes.

Q. What did he say to you?

A. They were in a hurry for the figures.

Q. What did he say to you? Not his exact words, but the [1058] substance?

A. Well, Mr. Hart was sort of impatient.

Q. You have to give the words that were said.

A. I don't remember.

Q. Can you remember the substance of it?

A. No, I don't.

Q. Had something to do with when you were going to get the work finished?

A. How soon could we finish the work, yes.

Q. Do you have any recollection how long it took to get these figures together?

A. I don't think it could have taken more than a day.

Q. And what did you do? Well, what was the nature of the work you completed? What form was it in? A. Typed form, you mean?

Q. Yes. What kind of paper? What do you call it?

A. Gee, I don't understand the question.

The Court: You are getting along all right. If you don't understand the question, you tell him.

Mr. Garrison: Some of the questions are pretty bad, I admit.

(Testimony of Faye Podesta.)

Mr. Garrison: Q. What kind of work were you doing? What were you seeking in this work?

A. The outstanding balance.

Q. Total of it? [1059]

A. Total of the outstanding balance.

Q. How did you compute them? What kind of machine? A. Adding machine.

Q. Then what did you do? Give Mr. Smead, when you finished, those additions?

A. We have him a copy of—I think we listed all the accounts by name of receivables and the balance and had a typed copy of all that for him.

Q. Did you give him a paper with your adding machine tape on the accounts payable?

A. The tape?

Q. Yes. A. Yes.

Q. And you didn't have any direct contact with Mr. Hart at the time? A. No.

Q. Your dealings were with Mr. Smead? Some-time after this——

Withdraw that.

Did you have a conversation with Mr. Smead when you gave him the material?

A. In all probability.

Q. Well, did you have any conversation with him regarding how well you had done in the assignment? A. He usually——

Q. No, I am talking about this particular occasion. You just [1060] gave me an answer a moment ago you had some conversation with Mr. Smead

(Testimony of Faye Podesta.)

when you finished in respect to his request during the time the work was going on.

A. Well, I don't remember.

Q. After this event occurred, did you have a request from someone in the month of December to sign something in connection with the work you did?

A. Yes, sir.

Q. And did you sign something?

A. Yes, sir.

Q. I will show you Plaintiff's Exhibit 22 and ask you if you—which is a photostatic copy of a paper, two sheets of paper—and ask you if you have seen that before, seen the original of that before?

A. Yes, sir.

Q. And what is it?

A. I beg your pardon?

Q. And what is that?

A. Well, this is just a statement that Janice Howard and Lyla Bowman and I witnessed, well, everything that occurred on August 20th, the figure we made up for Mr. Hart.

Q. In other words, this is a statement covering the subject matter of your testimony?

A. Yes.

Q. Who asked you to sign that? [1061]

A. I don't remember.

Q. And were you present when the other girls signed?

A. Yes, we were altogether.

Q. At the Lotz Agency office? A. Yes.

Q. You were still employed there at that time?

A. Yes.

(Testimony of Faye Podesta.)

Q. And this was signed about in December, and the event occurred in August that you have referred to.

Now, I show you Plaintiff's Exhibit 40 and ask you if you have seen that before? That is a copy of—apparently a carbon copy? A. Yes.

Q. Did you type that statement?

A. I don't know whether I did or Mrs. Howard.

Q. Can you look at that list and from your knowledge of the Lotz accounts tell us what that is?

A. Well, this is a list of all the unpaid items. This is the list of all the American Fidelity unpaid items. [1062]

Q. In other words, those are balances due from sub-agents? A. Yes, that is right.

Q. Can you tell us whether or not that is the list that was given Mr. Smead as a result of his request?

A. Yes, this is the list. I wouldn't have signed it if it hadn't been.

Q. I see that there is something written at the bottom there. Is that your writing?

A. Yes.

Q. When was that written?

A. I don't know the exact day.

Q. Approximately?

A. I imagine around December.

Q. That was probably written about the same time as the other document that we have identified?

A. Yes, in all probability.

Q. And this writing is yours, is it?

(Testimony of Faye Podesta.)

A. Yes.

Q. Do you remember on how many originals and copies, if any, you did write this on?

A. No.

Q. This writing says:

"This is a copy of the recap of all American Fidelity and Casualty Company's unpaid items, as per Ralph Smead's request August 20, 1951. Copy [1063] of statements were given to Mark Hart. Signed Faye Roach"

As I understand your testimony, you didn't actually see any of these documents given to Mr. Hart? A. No.

Q. But can you tell, independent of this notation on the bottom, by looking at this list whether or not it is a list of the accounts receivable on Lotz' books at that time of AFC balances.

Mr. Bronson: At what time?

Mr. Garrison: Q. At the time the tapes were run, August 20th.

A. You mean, in other words, these accounts that—. Yes, these are them.

Q. They are familiar to you by name?

A. Yes.

Q. The amounts, I assume, would not be?

A. No.

Q. Do you have any independent recollection of the total of these accounts receivable when you made them up that day and gave them to Mr. Smead?

(Testimony of Faye Podesta.)

A. No. The figure didn't mean anything to me at the time.

Q. I understand that. You say you did not type this material here?

A. I am not sure whether I did or didn't. [1064]

Q. Are you a typist of sorts?

A. I try. Well, I type.

Q. And do you recall when you first saw this list, this tabulation, where you were?

A. Would you repeat that?

Q. Do you recall where you were when you first saw this particular list of agents and balances?

A. You mean at the time they were made up?

Q. No, at the time you first saw this paper.

A. This particular paper?

Q. Yes. A. You mean——

Q. When you wrote—very first time you saw it, do you remember where you were?

A. In the office. Do you mean when it was made up? In the office.

Q. You don't recall the particular act of typing it up yourself? A. I can't remember.

Q. And the recollection you have that is most distinct in the writing out of a memorandum at the bottom? A. Yes.

Mr. Garrison: Cross examine.

Mr. Bronson: Well, Mrs. Podesta, it will make you nervous to be cross examined. I am not going to cross examine. [1065]

The Witness: I am much better now.

(Testimony of Faye Podesta.)

The Court: All right, you may step down.

(Witness excused.)

Mr. Garrison: I now call Mr. Horton.

E. W. HORTON

a witness called on behalf of the plaintiff in rebuttal, being previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as follows:

The Clerk: Mr. E. W. Horton to the stand, heretofore sworn.

Direct Examination

Mr. Garrison: Q. Mr. Horton, have you reviewed the exhibits that were introduced yesterday by Mr. Marks? A. I have.

Q. Will you keep your voice up, please?

Calling your attention to Exhibit O, do you have that before you?

A. Which is Exhibit O?

Q. That is the Schedule 9.

A. I have it.

Q. Do you note that the items in column number 2 consisting of the \$111,133.00 total were taken as of the end of the month?

A. Column 2? [1066]

Q. Yes.

A. That is the total of commissions and other income for the period here indicated.

Q. Yes. And the figure was taken as of a given date, were they not, in each case?

(Testimony of E. W. Horton.)

A. Well, on page 2 of the schedule it shows the different months in which it accrued.

Q. Yes. On page 1 it also shows the amounts after December, 1951? A. That is right.

Q. And are the computations made as of the end of the month? A. That is right.

Q. That is what I was trying to get. Will you explain to the Court your opinion of such a tabulation, taking the figures as of the end of the month, in determining the amount of funds due at any given time in relation to the amounts of money owed?

A. Well, in determining those things you must include the total receipts in a given month to indicate how well you can pay the account——

Q. Why?

A. To show the flow of cash coming in and cash going out.

Q. In other words, you have to take the total amount of money the man had during the month and know his ability to pay his bills? [1067]

A. That is correct.

Q. If he had here in December \$5,005.00, he might have had more or less all the balance of that month, all previous days of the month.

A. That is correct.

Q. So that it is your opinion there is no relationship to the amount of money in his account as of a given day when comparing his ability to pay his statements for the whole month?

(Testimony of E. W. Horton.)

A. The ability to pay should be based on the total flow of cash coming into the depository.

Q. Is that the way you made your statement of the Lotz account?

A. Well, in my statements I showed the total cash received by months.

Q. The answer is "yes"? A. Yes.

Q. Now, calling your attention to column 4, which is the "Portion of Operating Expenses and Drawings Allocated to AF and C operations", do you see that? A. I do.

Q. And apparently from this tabulation Mr. Marks had charged AFC's portion of the cost of running the agency at \$47,669.00.

A. That is correct.

Q. And the balance of the income is available for payment of AFC accounts? [1068]

A. Approximately \$64,000.00. That is the difference between \$111,000 and \$47,000.00.

Mr. Garrison: I wonder if I could pass this up, Your Honor? I am sorry I was holding it here. I don't need it. This is an important point, if Your Honor would——

The Court: Well, let me try and follow this testimony.

Mr. Garrison: Yes, that is what I want.

The Court: In respect to the last two items counsel inquired about, in what respect do you differ from the other?

The Witness: A. So far as the amounts are concerned, we don't differ.

(Testimony of E. W. Horton.)

Mr. Garrison: Q. All right, there is no dispute with the totals in the column? A. No.

Q. It is the use of those totals that you have some disagreement with? A. That is correct.

Q. Calling your attention to this fifth column over from the left, "Portion of Operating Expenses and Drawings Allocated to AFC Operations", that is \$47,000.00? A. Correct.

The Court: Wait a minute.

Mr. Garrison: Fourth column from the left. \$47,669.00.

Mr. Garrison: Q. And that is the portion of expenses that was charged to American Fidelity?

A. That is correct.

Q. And they arrived at that by taking all of his net premiums and his commissions from other sources? A. \$47,000.00?

Q. No, I mean the \$47,000.00 refers to AFC's portion.

A. Forty-seven thousand refers to AFC's allocation of the total expenses.

Q. Yes. And how did they arrive at that?

A. On page 3 they show how they allocated the expenses to it.

Q. They used a formula?

A. Used a formula. It is on page 3 of schedule 9.

Q. After taking the portion out that was chargeable to AFC, what did they do with the balance of the amounts paid for overhead expense?

A. From the \$111,133.00 they deducted the \$47,000.00, which left \$64,000.00 of commissions and

(Testimony of E. W. Horton.)

other income as funds theoretically available for the payment of amounts due to AFC.

Q. And why isn't it a reasonable thing to do that?

A. Well, I was applying this same theory to Mid-States Insurance Company, and then carried it further that we would apply this same theory to each and every company in which he was doing business, and it seems that using the \$111,000.00 and deducting \$47,000.00 for expenses allocable to AFC, we [1070] have \$64,000.00 in funds which we can apply to AFC.

Now, using this same statement and inserting the \$55,000.00 as allocable to Mid-States, you would have approximately \$56,000.00 in funds available to apply to payments of Mid-States, theoretically.

Then carrying that a step farther and using the other companies there, and putting in the \$111,000.00 in the column as it stays, and applying \$22,000.00 as expenses for the other companies, leaves available \$89,000.00.

When you take and add the three amounts available to these various companies, it aggregates \$209,000.00, where we only had \$111,000.00 as other income to apply.

Q. That's a good start, but let's back up and run over it again. I think I know what you mean, but it is very hard to follow.

They took the total cost of running the agency, didn't they? A. That is correct.

Q. And then Mr. Marks said that, "in order to

(Testimony of E. W. Horton.)

see who should pay the cost we will divide it up among the companies”?

A. That is correct. [1071]

Q. “We have a formula. We will allocate it to the entire proportion of AFC and allocate a proportion to Mid-States.” At least at this point they have, of course, allocated a portion to AFC?

A. That is correct.

Q. And in this statement they assume that after allocating AFC’s portion, all the balance is available to pay AFC’s balance.

A. \$64,000.00, that is right.

Q. And under this exhibit or schedule, where did the money come from to pay the other company’s portion?

A. The \$64,000.00 on this schedule, all of it is applied to AFC.

Q. In other words, they charge AFC’s account with the portion of the expense, and then say all the balance of the money is available to pay AFC’s account?

A. That is right.

Q. There would be nothing available to pay the portion of the other companies?

A. That is right.

Q. So that if you went through that same way, following this same thing, and applied this theory to all the companies that AFC has done here, and did the same thing for Mid-States and the same for the other companies, you would have to have how much did you say? [1072]

A. Well, the applicable funds then would be

(Testimony of E. W. Horton.)

\$209,000.00 that we would be theoretically applying to each of these companies on this basis, as I see it.

Q. This thing assumes that once AFC's portion of the overhead is charged them, all the rest of the money is available to pay their account with.

A. That is the way this schedule is prepared.

Q. But it actually only deals with a portion of the total expenses necessary, isn't that right?

A. I don't quite understand the question.

Q. Well, the total—a representative figure, we will call 100% for expenses of running the Lotz Agency.

A. Yes.

Q. And they have charged some portion to AFC?

A. Thirty-eight per cent, it works out.

Q. Sir? A. Thirty-eight per cent.

Q. So the balance, they say, was available in funds to pay AFC's account with?

A. The balance after deducting \$47,000.00 from the \$111,000.00, \$64,000.00 all is applicable here to AFC.

Q. If they paid AFC, the creditor, in effect, the sixty-four thousand, others would be holding the bag?

A. I don't exactly know what you mean by that, but all I can say is that all these funds, \$64,000.00, have been applied to [1073] a theoretical amount of cash available for AFC.

Q. Certainly. If they had used the balance of \$64,000.00 and paid it on AFC's account, the creditors of Lotz to run his agency, rent, lights, gas,

(Testimony of E. W. Horton.)

water and payroll—would have gone unpaid because the money had all gone to AFC.

A. I guess you could assume that.

Q. Well, certainly. Now that, he says in the next column, is the net funds theoretically available to remit to AFC.

A. In the third column?

Q. The one following the one we are talking about, the net funds theoretically available.

A. Right.

Q. I assume he means those funds would have been available if something else hadn't happened.

Mr. McKinnon: That calls for a conclusion of the witness, and I object to it.

The Court: That may go out.

Mr. Garrison: Q. Let's see what actually did happen in the period involved.

Mr. Bronson: We are not dealing in theories, but dealing in facts.

The Court: We are on the fifth column?

Mr. Garrison: Yes. "Net Funds Theoretically Available to Remit to AF & C."

Mr. Garrison: Q. And that is the column that shows how [1074] much would be available if they took all the money Lotz got and only paid AFC's portion, and used the balance of the funds that would have otherwise gone to pay his bills and paid it on the AFC account, is that right?

A. That is right.

Q. That is a theoretical chart, isn't it?

A. Schedule 9?

Q. Yes. A. It assumes certain things.

(Testimony of E. W. Horton.)

Q. Let's find out, without assuming anything, just what the cold, hard facts are. Take the period of—take the months of July, August and September. Can you tell us what funds Lotz got in actual dollars, not assumptions of what he got, who he got it from, and what he did with it?

A. During the months of July, August and September, 1951, premium collections totalled \$278,731.00, of which \$125,516.00 was for Mid-States, \$129,280.00 was for American Fidelity, and there was \$7,000.00 transferred from the operating account, and \$16,934.00 received from other sources, totalling the \$278,731.00.

Q. All right, now, during those three months period he got in two hundred seventy-eight thousand? A. That is correct.

Q. How much did he get on account of business written in Mid-States? [1075]

A. \$125,516.00.

Q. How much from business written in American Fidelity? A. \$129,280.00.

Q. Those are approximately the same—one hundred twenty-five and one hundred twenty-nine?

A. That is correct.

Q. Now, that's what he got in from his agents for business written in that period?

A. They are the actual collections, right.

Q. What did he do with that money?

A. During that same period he paid to Mid-States Insurance Company \$2,812.00.

Q. What did he do with the balance?

(Testimony of E. W. Horton.)

A. He paid \$198,937.00 to American Fidelity, and he transferred \$34,200.00 to his operating account, and paid to others \$39,265.00, or a total of \$275,215.00.

Q. And you have here in writing what you have just given us? A. That's correct.

Mr. Garrison: I ask that this be received in evidence.

The Court: It may be admitted and marked next in order.

(Whereupon document entitled "Joe Lotz Insurance Agency, Summary of Receipts and Disbursements Months of July, August and September, 1951" was received in evidence and marked Plaintiff's Exhibit 41.)

Mr. Garrison: Q. You say he took out and put into his [1076] operating account \$34,200.00?

A. I think that is the figure. It is right there.

Q. And he paid to others—other companies, is that right?

A. Other companies. Other disbursements. Mostly other companies, I would say.

Q. \$35,000.00? A. That is correct.

Q. So that the difficulty, I take it, with this Schedule 9, Exhibit O, is that Mr. Marks has overlooked in figuring what would be available to pay AFC's account, these two items of withdrawals by Lotz to pay other companies and to pay his own operating expenses.

Mr. McKinnon: If the Court please, that is objected to as calling for a conclusion of the witness.

(Testimony of E. W. Horton.)

This entire line of interrogation goes to a legal interpretation of accounting facts, all of which facts are clearly set forth in the record and undeniable.

Mr. Garrison: I withdraw the question.

Mr. Garrison: Q. We were talking a moment ago about Lotz' bank account, and are you familiar with that? A. Yes.

Q. You had available to you the bank statement, didn't you?

A. This bank statement? Yes.

Q. Did you?

A. Yes, I have had this. [1077]

Q. Just keep it. And do you see the deposit in there of \$67,000.00?

A. There is a deposit in here of, I think that's \$67,500.00 here is part of this original deposit of \$68,811.00.

Q. There was one check for payment on which it was stopped and then they issued another check?

A. Yes.

Q. But forgetting about that, do you find a deposit there of \$67,000.00? A. That's right.

Q. How much was in that bank account when that deposit was made?

A. On September 17th, after that deposit there was \$74,253.00.

Q. That isn't what I asked you. How much was in the bank before that deposit was made?

A. On September 13th there was on deposit \$2,079.00.

(Testimony of E. W. Horton.)

Q. And do you know where that \$67,000.00 came from?

A. The records indicated that they were collections from Public Service.

Q. All right. Do you find that after that \$67,000.00 was deposited there was a \$60,000.00 check drawn?

A. Here's a charge of \$67,000.00.

Q. And do you know that there was such a check drawn from your study of the books?

A. I do. [1078]

Q. Do you know who got the money?

A. The check was made payable to American Fidelity.

Q. You don't have to refer to your notes. You know that. It was deposited in their account, wasn't it, in the Central Bank?

A. I believe the endorsement bears their name.

Q. Certainly. And can you give us a yes or no answer on whether or not the \$60,000.00 check drawn on that account had to include some of the Public Service money?

Mr. McKinnon: Well, if the Court please, here's a conclusion again. I think this record of the influx and outgo of funds appears so clearly established by documentary evidence that there is no present inquiry need be made, and this is a legal argument which counsel will be most eloquent on and we will try to be eloquent on in response when the proper time comes.

Mr. Garrison: I think it does speak for itself.

(Testimony of E. W. Horton.)

It is elementary and it is perfectly clear. I won't burden the Court.

No further questions.

Mr. McKinnon: If the Court please, I'm not going to cross examine the witness at all. I'm going to wait now and argue legally.

The Court: Step down, sir. (Witness excused.)

Mr. Garrison: That is the Plaintiff's case. It is not [1079] quite twelve o'clock, Your Honor, and I would like the record to show we have met our schedule here.

Mr. Bronson: Have you gentlemen any more?

Mr. Kakures: None.

Mr. Bronson: We have a motion to dismiss the action, if the Court please, against the two corporations, American Plan and American Fidelity and Casualty Company. I prefer to state the grounds and make the argument on that at the time that the argument is set on the case generally on its merits—next Tuesday—if that is agreeable to counsel and agreeable to Your Honor.

The Court: Very well.

Mr. Bronson: That will terminate the proceedings, and we rest on the defense.

The Court: Both sides rest? Now you have Saturday, Sunday and Monday to prepare yourself and that will give you a full opportunity to do full justice to your cause.

Mr. Garrison: Thank you.

The Court: We will take an adjournment until 10:00 o'clock Tuesday morning.

Mr. Bronson: Before Your Honor leaves the bench, I have spoken to one or two counsel but not to Mr. Garrison. Because we didn't keep an index record by exhibit number of the exhibits here, we would like to have the privilege jointly with all counsel of withdrawing from your Clerk all the exhibits [1080] in this case, and then I am sure we can arrange with Mr. Garrison if he needs to look at them a division in the intervening time.

The Court: Then evidently it is agreeable to all to have all these available to all parties in interest?

Mr. Garrison: Yes.

Mr. Kakures: So stipulated on our behalf.

The Court: Very well.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. on Tuesday, May 18, 1954.)

ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Garrison: If Your Honor, please we filed at the beginning of this case a so-called trial memorandum in which we outlined very briefly the issues in the case, what we thought the evidence would prove, and I made an opening statement at the beginning of the case as to what we thought the evidence would prove. We stand on both that statement and the trial brief as we presented it.

The action, of course, as we have heard these two weeks now, is one by the plaintiff for damages because of certain acts of the defendants Lotz and Smead and defendants American Fidelity and Cas-

ualty and the American Plan. Those damages in the actual out-of-pocket sense are \$281,746.00. There is no dispute as to the fact that the plaintiffs are out of pocket that much money. The issue arises as to whether or not all of the defendants are liable, and if so, whether they are all liable in the same amount.

There is a cross-claim, as Your Honor knows, by Mr. Lotz, which I shall not deal with. There were three cross-claims by defendants American Plan and American Fidelity, two of which have been abandoned, and a third cross-claim is one which says in effect that if we got some of your money, we are entitled an offset because some time previously you got some of ours. [1082]

I do not regard this case as a case involving the serious questions of law. I think it is a question of fact case. We think there are four pivotal points in the case dealing with the question of facts and evidence. The first, we think is the question of Mr. Lotz' insolvency.

The second is the fact of his agency with the plaintiffs and his breach of his fiduciary obligation as an agent.

Thirdly, we think, so far as the defendants American Plan and American Fidelity are concerned, the pivotal point is the knowledge that Mr. Hart as their representative had of the fact of Mr. Lotz' agency and his fiduciary relationship and his breach of that duty and relationship and his participation in it.

Fourthly, we think there is a question of the loss

by the plaintiffs. I will try to tie in the evidence with these four key points as I go along, and I think the evidence supports the existence affirmatively of those points, the plaintiff is entitled to recover against all of the defendants.

One section of the evidence that I think is important and persuasive is the group of statements that were taken by the plaintiffs in this case and that were given by some of the defendants in the case. I think they are important not only because of their contents but because of the varied ways in which they were prepared and the circumstances surrounding their preparation. Your Honor will recall that the first one was the [1083] one that was prepared by Mr. Smead on December 6, which consists of ten pages, which carries in it a number of changes, corrections, and which is signed not only by Mr. Smead himself but also by Mr. Lotz, and whose signatures were acknowledged by Mr. Lotz' attorney.

The second statement is a supplement to that statement which was prepared the next day by Ralph Smead, and which furnishes details not previously included in the main statement. Then on the same day Mr. Lotz, who had not completed a full statement on his own behalf, supplemented Mr. Smead's statement as of December 6, and this he wrote out in his own hand, carried down to Santa Monica, where he had a meeting with Mr. Titus and Mr. Hatfield, and delivered his supplement to Mr. Smead's statement there.

Then there is the statement of December 8th,

which is three pages, signed by both Mr. Smead and Mr. Lotz, and which likewise furnishes additional data not theretofore contained in the original statement.

And then there is the very significant letter dated November 27th, which is signed not only by Mr. Lotz and Mr. Smead, but also by their attorney, Mr. William B. Mead, and this letter says:

“As far back as last July I had been losing money and was unable to pay my account to American Plan Corporation and other debtors, and it became [1084] necessary for me to use trustee funds in the operation of my business. By August 31, 1951 I was insolvent to the extent of \$100,000, and where I should have had approximately \$190,000 in a trustee account, there was only \$4,000 in hand and in cash and in banks. The American Plan Corporation was insistent that I make a payment on my account, so I made arrangements with the Public Service Insurance Company to pick up approximately \$133,000 of insurance. I paid them a 25 per cent commission for the business, which amounted to approximately \$32,000 and received from them the net amount of \$100,000. I wrote the insurance up in the Mid-States Insurance Company, but instead of leaving it in the trustee account for Mid-States, I paid this money to American Plan on their bill. I still owed them around \$60,000, and so around the first of November I made arrangements with the American Plan to cancel about \$60,000 worth of insurance I had written with them but had not paid for, switching this over to Mid-States. The

result is that I am now unable to pay my account with you, which will be due December 1."

And the last statement, and the one which I personally [1085] have more interest in than any other, is the one that was taken in my office, and at which, you will recall, Mr. Smead and Mr. Lotz testified that several hours was consumed in the discussion and the dictation and the transcription and the corrections, and I will call Your Honor's attention to the fact that in this statement there are, I would estimate, at least ten pen and ink changes which each of them made, and which each of them initialed, and this statement ties together all of these other statements and supplements and brings into one document all of the facts that were piecemeal included in the previous ones.

So we have these statements without background, and to me it is highly significant that they were made available in that way, and likewise they are exceedingly important because of their contents.

I would just like to take this statement of Mr. Smead's, which was the first one prepared, prepared by him in his own hand, written at great length and considerable effort, with a number of changes and corrections, and which was in their opinion sufficiently valid to involve signature before their attorney, and point out to you that in this statement, which incidentally was denied in detail by Mr. Hart,—you will recall Mr. Bronson took him step by step through this statement, and whether he denied it all or not I do not know, but he denied a great deal of it, and thereby raises the

issue of these [1086] statements. Let us see what the statements say and what are the facts, and I am not going to labor the question of whether the conversations occurred because as to those there is a clear conflict. But let us take the things in the statement that we can relate to either performance of fact or other undisputed documentary evidence. The first thing the statement says is that they owed the American Plan some \$247,000 in August of 1951, and that they had a check returned from the bank unpaid for \$50,000, and they also owed a balance to American Plan of \$7,000. Well, now, those facts are admitted by Mr. Hart. There is no dispute about those facts. They were called to New York and they had a meeting there. No dispute. They were asked specific questions in New York and those questions and those answers Mr. Smead wrote out in the form of question and answer, question and answer, question and answer. I will read that part on page 3.

He says:

“Numerous questions were raised by Mr. Hart and Mr. Feller pertaining to the finances of the agency. Specific questions were asked of me.

“Question: Amount of premiums owed companies?

“Answer: Approx \$250,000 American Plan, \$29,000 Mid-States, \$10,000 miscellaneous companies.

“Question: Amount of receivables?

“Answer: Approximately \$75,000. [1087]

“Question: What happened to the monies collected:

“Answer: Payment of advance commissions and operating costs.”

Then it says:

“Various questions were asked by American Plan pertaining to the use of money by Joe. Questions were raised as to how we anticipated to pay accounts.”

There was a dispute at that point as to whether or not the amount of receivables that they had coming, that Lotz had coming from American Fidelity sub-agents was \$75,000.00 as Mr. Smead says he told them, or was \$150,000.00, as Mr. Hart says he told them.

Let us pause there for a minute and check to see the significance of that disparity in amounts. If the amount of money coming from sub-agents to Lotz because of American Fidelity business was \$150,000.00, it would have been more reasonable than for Mr. Hart to expect Lotz to go out and collect that money to pay his account without having to invade premiums of other companies, because he had \$250,000.00 coming. He could get \$150,000.00 from sub-agents on their business, then they would only have to borrow \$100,000.00, which he says was the loan in discussion. But if the figure was \$75,000.00, which Mr. Smead says he told them it was, then of course, it [1088] would be quite unrealistic to think that he could collect that \$75,000.00 from sub-agents to pay his account in another month or two by raising the difference between \$75,000.00 and \$250,000.00. It would be far better for Mr.

Hart if the figure had been \$150,000.00 and that is the way he says he heard it.

Let us test that clear conflict out against the facts in the case that are undisputed. And I think it presents a striking coincidence, because the auditor who audited these books after the event found that actually, as of that date, the accounts receivable was \$90,000.00, not \$150,000.00. \$90,000.00. Miss Howard, who worked in the office of Mr. Lotz, who made up the very tabulation at Mr. Smead's request of the agent's balances of American Fidelity, Plaintiff's Exhibit 40, totalled the agent's balances at \$71,642.00. Mr. Hart, himself, when he wrote his interoffice communication, not more than sixteen days later, told his own treasurer that there was \$70,000 of accounts receivable, and this is to me very significant, and this is the letter of August 29th addressed to Mr. Will, the Treasurer, from Mr. Hart himself, and in it he says, "At present writing there are premiums outstanding of \$70,000.00 due Joe Lotz from sub-agents and applicable to policies of the American Fidelity and Casualty," and he instructed Smead to either effect collection within a reasonable time or, failing to do so, cancel the individual policies for non-payment of premiums. In any [1089] event we are assured of an additional \$70,000.00 credit either by cancellation or collection.

Now, it is true that between the New York meeting and this letter he had been out to Oakland and had picked up, I think he said, some \$20,000.00 in premiums from Lotz, and to that extent that \$20,-

000.00 might be added to the \$70,000.00 which would bring us to Mr. Horton's figure of \$90,000.00. But in none of these pieces of evidence which come now to stand out in very clear relief when the atmosphere is clarified and the dust is down, not in any one of those has the figure ever gotten anywhere near \$150,000.00 or \$140,000.00.

So we will pass the question of whether or not Mr. Smead told him it was \$75,000.00 or \$150,000.00. You will remember Mr. Hart said when he came out to Oakland Mr. Smead said it was \$75,000.00 and he pointed out to him it could not be \$75,000.00. It had to be \$150,000.00, and Smead said, "Oh, yes, I guess that is right."

Mr. Hart also denied that in the New York meeting he asked what balances were owed other companies and what had happened to the money and what generally was the financial condition of the Lotz agency. I am going to pass that one over a minute because I think it is a little more significant to discuss it when we get them out to Oakland at the Oakland meeting. They did discuss, however, how they were going to [1090] pay the account off and what their plans might be for settling the American Fidelity and Casualty account. Mr. Smead says they discussed getting another company writing a substantial volume of business and using the premiums from that writing to pay the American Fidelity account, and the meeting adjourned on that note.

What did they do? We submit that the evidence shows that they did exactly that. Mr. Lotz immedi-

ately departed for Chicago and worked out a new, better arrangement with Mid-States on the basis of assuring them of an increased volume of business. Mr. Smead immediately returned to Oakland for the purpose of making collections on the account. They fortuitously ran across the Public Service Company, who was in difficulty because of surplus limitations, and who had to get rid of some of its business, so instead of going out and beating the bushes for a volume of business, they found it in one central spot and they were able to take that as a wholesale transaction and transfer it in a block off of the Public Service books onto the Mid-States books. It cancelled at first the Public Service policies and then they wrote new policies in the Mid-States—just exactly what Mr. Smead says was the plan when they were in New York. And then what did they do? They took the money they got from Public Service and they paid it on the American Fidelity and Casualty Company. Just exactly what Mr. Smead said they were going to do. [1091]

Now, there is another little significant conflict here. Mr. Smead said they were talking about a \$50,000.00 loan when they were in New York. Mr. Hart said they were talking about a \$100,000.00 loan. That is only significant because if the loan were \$100,000.00 it would just wash out the American Fidelity and Casualty account completely, assuming Mr. Hart's first figure of \$150,000.00 of balances due in the agent's and the \$100,000.00 loan, that is the \$250,000.00 that would be needed to pay the American Fidelity and Casualty, and then of course there would be no invasion of

any one else's funds, and there would be no necessity for being involved in any question of someone else's money. But oddly enough, Mr. Smead says that they talked about \$50,000, and oddly enough, Mr. Feller says when he came out to Oakland, went to the bank and tried to make the loan, he was trying to make a \$50,000.00 loan. At any rate it was exactly what Mr. Smead said they were going to try to do, and that is exactly what they tried to do.

The statement then goes on to recount that Mr. Hart and Mr. Feller—I think it was seven days after the New York meeting—came flying out to Oakland. And bear in mind Mr. Hart was never concerned about Lotz' account. He knew it could be easily liquidated. He knew they had these large balances in the hands of agents. He had to borrow some money from the bank. He was not concerned. It was a routine matter. [1092] But within seven days, and even before the seven days, Mr. Will, the Treasurer, teletyped Mr. Smead and Mr. Lotz and asked them if they could not arrange to have the deposits made in the American Fidelity account, made directly and immediately so that that bank could report to them the deposits daily, an action which amounts to a clear abrogation of Mr. Lotz' contract with them, because he had sixty-five days—I believe at that time seventy-five days within which to make his payments on his accounts. But even before Mr. Hart arrived in Oakland they proposed that that contract be abrogated to the extent of cutting out any credit period and making the payments directly and immediately. That seems to me to be significant in the light of Mr. Hart's very

relaxed attitude on the condition of the account. There wasn't any discussion in New York about termination or any cancellation. He was not worried about it. He was not concerned. But he did come out with his general counsel within seven days or eight days after the New York meeting. He teletyped Smead in the meantime asking about collections, and they had their meeting on August 20th in Oakland, and on August 22nd, as the statement says, they prepared and secured from Mr. Lotz his signature to this highly significant document which is in the most complete legal form. They cancelled Mr. Lotz' general agency contract, they tore up his policies, they deprived him of any control over his own financial affairs thereafter, and they [1093] empowered and gave Mr. Smead supreme authority as their agent in respect to Mr. Lotz' affairs. [1094] They handed Mr. Smead the letter with the \$1,000.00 bonus—let us use that term for a moment—if they got paid off in less than 30 days, \$250,000, they gave Mr. Smead supreme authority as their representative from Mr. Lotz' Agency with respect to financial matters. Then in Mr. Hart's letter to Mr. Will that I referred to before, August 29th, in discussing what they did to Mr. Lotz, Mr. Hart says this: I should go back. "Attached hereto is a memorandum agreement between the American Fidelity and Casualty Company, the American Plan Corporation and Joe Lotz." That is the one executed in Oakland August 22. "You will note that this agreement spells out Joe Lotz' obligation to us as well as the mechanics of liquidating such. In effect Joe Lotz is an

employe of the agency at a salary of \$150.00 per week and is not permitted to handle any of the financial affairs of the agency. On the other hand Ralph L. Smead has been appointed as our representative and is in complete charge of the agency from the financial standpoint."

I mention that at this point because it comes as a striking contract to Mr. Hart's testimony that this was just another collection matter. He was not concerned and he did not intend in New York to cancel Mr. Lotz' agency, and he came out and only ultimately did it because Mr. Lotz had a better deal with Mid-States.

Mr. Smead states in his statement that Mr. Hart [1095] instructed them to deposit all funds received by that agency in the American Fidelity Company trustee account in the Central Bank, that is exactly what the contract says for them to do, that is exactly what the letter appointing Mr. Smead, their agent, says for him to do. In his statement he says that Mid-States had a balance coming due in August, and that Mr. Smead called Mr. Hart and asked him if he should pay the Mid-States balance, and Mr. Hart said yes, he should. Mr. Hart now admits that that is true. However, the statement then goes on to recite that by October they had paid all of the American Fidelity balance down to \$61,000.00, entered into the arrangement of repeating the performance they had undertaken on the Public Service business and took \$61,000.00 of business that had been written for the American Fidelity and gave the liability to the Mid-States. So it seems to

me when you analyze that statement that the only points in dispute are the points involving alleged conversations. All of the acts that are reported there were performed. The very things that brought about this loss that Mr. Smead says were contemplated in New York were actually done.

Now, there are a number of conversations that are reported here. Your Honor will remember that at the meeting in New York Mr. Smead said Hart told Lotz not to disclose Hart's position in the matter with anyone out in Chicago in the Mid-States Corporation, for Lotz not to see Mr. Cass because he [1096] might be friendly with Mid-States, having formerly worked for them.

Mr. Smead says that Hart put the call through station-to-station to avoid the operator in Chicago knowing where the call originated, and that when one of the men asked Mr. Hart, "What is going to happen to us when Mid-States finds out what is going on," Hart said, "Don't worry about that. We will meet that when we get to it."

Now, maybe Mr. Smead made all of that up. I have never actually heard about putting any station-to-station calls to avoid the identity of the origination spot being disclosed. I can see now that that might happen. But I'm not going to argue that you ought to believe Mr. Smead on that and you ought to disbelieve Mr. Hart, because there is a clear conflict of the evidence. I simply say that it seems to me strange that Mr. Smead and Mr. Lotz would go so far out of their way to fabricate this detailed conversation. Actually it lends itself beau-

tifully into the scheme that was discussed there and which was actually completed. Certainly Mr. Hart would not want his position known because the Mid-States would become suspicious immediately. Certainly did not want Mr. Lotz to see Mr. Cass because of the same reason. Certainly if he were going to go through with this he would have to run the risk of what would happen when Mid-States found out about it, and he would worry about that when he came to it. Well, that is exactly what he did, [1097] and I think he is worrying about what is going to happen when he now has come to it.

At any rate, Your Honor, these statements record, insofar as the essential theme of this trial is concerned, they record exactly what happened, and it could not have happened by chance. It had to happen by design, and if we did not have the performance of the parties, the clear performance of the parties, it might be a little difficult to understand the statements, but when you put them up against the facts of life, the cold reality of what the parties did, then it becomes just as simple as a primer.

There is no question but that regardless of what was said in New York between the parties—let us forget that—let us just put that over in the category of conflicting evidence. Let us try to approach this from the standpoint of what is there in the case which is not in dispute? What can we tie to as being established fact? There is no question that when Mr. Hart and Mr. Feller got to Oakland they knew that the Public Service deal was being negotiated, and

they knew that it was closed while they were there. Mr. Hart so testified. True, he says his interest in the Public Service deal was based upon his knowledge or his belief that Mr. Lotz was going to get an advance commission for Mid-States because he had an advance commission contract with Mid-States. So he was not interested in the premiums. He did not think he was going to get the [1098] Mid-States premiums. He was only going to get Mr. Lotz' advance commission.

Let us just pause for a minute and check their testimony with the facts. It is true that Mr. Lotz had a fifteen per cent advance commission under his contract with Mid-States, so if he wrote \$100,000.00 worth of business for Mid-States he would be entitled to retain fifteen per cent of that as advance commission. The balance, if any, would come after the business had run off, and depending on whether or not the losses had been sufficiently low as to permit any commission to be paid. But in getting this Public Service business, because they got it in a wholesale block, Lotz paid the managers for Public Service Insurance Company a twenty-five per cent commission for the business, and Mr. Hart said he knew that. So that meant that even though Lotz was entitled to retain fifteen per cent as advance, he was paying out twenty-five per cent, so that he would be out of pocket ten per cent on the Public Service deal by Mr. Hart's own knowledge and testimony. So instead of Mr. Lotz getting any money from the Public Service Deal honestly with which to pay American Fidelity, he would

have been required to have paid out of pocket a substantial piece of money to get the business, and had the premiums gone to Mid-States as they should have, then, of course, he would have been worse off insofar as American Fidelity and Casualty are concerned than had he not written it at all. [1099]

So how could Mr. Hart say to you, if Your Honor please, that he was interested in the commission that Mr. Lotz was going to get? If he were only interested in the commission, why would he care how the checks were made payable and how they were going to be endorsed? You will remember now there was a little difficulty with the Public Service. They wrote one check for \$60,000.00. They wrote it payable to Lotz personally, and then they got apprehensive and they stopped payment on that check, and they reissued it in the name of the trustee's insurance company, and Lotz endorsed and deposited that check, and that was one of the checks involved in the lawsuit against the Anglo Bank, because we said he did not have authority to endorse the check. But if Mr. Hart was not concerned about this account, it just was a normal collection matter, why did he teletype Mr. Smead on the 29th of September, just a week after he had been in Oakland, as follows:

"How about funds of \$1,450.00 which you received last Friday? Also has check of \$30,000.00 actually been paid at the bank AFC account?

"Answer to both questions: Checks are all payable to Mid-States Insurance Company awaiting authorization required to deposit. We are advised by

that company that authorization has been forwarded to us. That is the only holdup, but it has been definitely cleared. After your telephone [1100] conversation yesterday with Smead, who incidentally is a banker of the Central Bank, everything is much better."

That is Mr. Hart's telephone call to Mr. Smead.

This is Hart coming back:

"Understood Public Service checks were made payable to Lotz. Has this procedure been changed?"

Mr. Smead says, "First check payable to Mid-States. However, this has been changed and if we do not receive authorization right away from them we can have reissued."

Is that the interest that Mr. Hart would normally have in an agent's operations that were perfectly healthy and in simple liquidation process? Why was he concerned about the endorsement of the Public Service checks any more than the checks of any other assured or any other sub-agent that Mr. Lotz might have? And why did Mr. Hart ask for the address of the Public Service Insurance Company through the teletype of September 6th? He said he did it because he became suspicious and he began to doubt that Mr. Lotz had a deal with Mid-States Insurance Company whereby Mid-States were going to take this Public Service business and not get paid for the premiums. He became suspicious.

So what does he say he is going to do with that suspicion? Not call the Mid-States Insurance Company, the one whom he thought might know the

fact, but to call the Public [1101] Service Company, who would not know it anyway. He would have no way of knowing what Mid-States understood to be the case, and he was going to ask them what they thought Mid-States knew.

Mr. Smead says that that is the way they were going to pay the American Fidelity and Casualty account and what did they actually do? They paid them every penny that they got from the Public Service Company, and they put every single penny's worth of liability under those policies on the books of the Mid-States. So that the net result, when they got through with that and the other transactions, including the rewrite, was that where on August 13th American Fidelity Company had \$250,000.00 coming, Mid-States had \$29,000.00 coming, by October, American Fidelity had nothing coming, they were overpaid \$10,000.00, and Mid-States had \$416,000.00 due from Mr. Lotz, an insolvent insurance agent.

Mr. Smead says that Mr. Hart told him not to tell Public Service about American Fidelity and Casualty Company's interest in this Public Service deal. Mr. Hart denies it. Well, we will leave that over on the side of matters which are in, as Mr. Bronson says, high conflict. But it certainly would be the act of a person who was benefitting to the extent of some \$90,000.00 in a transaction which was shot full of wrongdoing, agency breach. I am sure that the measure of the Public Service transaction must be clear to Your Honor. Those insurance transactions are always complicated. I am never satisfied when [1102] I have tried to explain them

to anyone. I do not know that I am satisfied with my own understanding of them. But just running over it again very briefly, the Public Service was in trouble with the Insurance Commissioner because they did not have enough surplus. They actually ultimately were taken over and went out of business. They did not have enough surplus, so they had to get rid of some of their writings. They had to do it fast, and they had to do it in substantial amounts. So it was a natural for this kind of situation, they just simply took those twenty-two hundred or whatever they said the number of policies was out of Public Service and they cancelled. The Public Service gave up the premiums that they had theretofore been paid by the sub-agents for a portion of the policies remaining unexpired, they gave that money less the twenty-five percent commission to Mr. Lotz. So then Mr. Lotz took those policies and rewrote them without the knowledge of the Mid-States Insurance Company, in the Mid-States Company on their policies, thereby giving the Mid-States that liability of \$130,000.00 or \$150,000.00 and giving the premiums to the American Fidelity. It is important to understand how such a thing is possible. You might say to yourself, "How can business be done if such a thing as that is possible?"

In the first place, under a general agency arrangement, and under this contract that Mr. Lotz had with both of these companies, of necessity he had the right to issue policies in the [1103] name of his principal. Let us call it binding authority. He had the right to bind his principal by issuing policies,

and in the normal course of events he will issue one policy or two and then they are forwarded, and the company always has the opportunity of controlling in that way his underwriting practices. But he has that authority and he can legally bind the company not only on the normal kind of transaction of one, two, or a few policies, but by virtue of the authority itself he also has the power to write a thousand policies or two thousand policies, and if he wants to do a wrong, he can write those policies without the company's knowledge, and whether they like it or not they are stuck with it. They may have an action against him, but as to the public, they are on that business and they can't get off of it. But it must be remembered that this transaction, both the Public Service and the American Fidelity and Casualty rewrites were not normal transactions. They were extraordinary. In fact, Mr. Smead said that they had never had one like it before in Mr. Lotz' agency. It was not the kind of business that it was appointed to transact. He was appointed to go out, get business from a number of agents, and have the policies written at the inception, and this was the extraordinary thing that happened to come along to meet an extraordinary situation, and because of the extreme pressure that these teletypes record, Mr. Lotz and Mr. Smead yielded and they took this business and did not tell the Mid-States Insurance Company [1104] that they were going to do it.

Mr. Smead recorded in his statement that he asked Mr. Hart about paying the Mid-States \$29,-

000.00 for their balance due in August. Now, the significance of that is two-fold. First, it shows the complete domination of Mr. Hart over his agent, Mr. Smead, because certainly there wouldn't conceivably be under a normal, healthy agency relationship the necessity of asking one competitor company whether he should pay his account to another competitor company. That is one aspect of that. The second is that that payment became due to Mid-States on August, and why did Mr. Hart want that account paid? Because if it were not paid in August, Mid-States might be forced into some kind of inquiry or investigation. They would become suspicious of Lotz' financial condition, which would have been the first thing that might have occurred that would have caused him to come in, and as they would then have discovered the rewriting of the Public Service business which was going on and the collection and payment of American Fidelity of all collections from the sub-agents which was then going on, and it would have thwarted the entire plan of the American Fidelity and Casualty accounts. But by paying them their \$29,000.00 due that month, the Mid-States people were perfectly content. They had no notice that Mr. Lotz was in financial difficulty. They had no knowledge that he was doing anything in violation of his agency contract. Every account with him was current, and they [1105] had a perfect right, as they did, to assume that Mr. Lotz was not only performing his contract, but was obeying the law.

Mr. Hart says that when he was in Oakland he

was so relaxed about Mr. Lotz that he did not even ask him how much money he owed other companies or what might be due sub-agents or other companies, and he did not ask him to get him any figures. He did not particularly concern himself with the financial condition of Mr. Lotz' agency. He simply asked Mr. Smead how much money was owed them from their sub-agents because of the American Fidelity and Casualty writings, and Smead said \$75,000.00, and he pointed out to him that it had to be \$150,000.00.

Smead says, "I guess you are right."

Mr. Hart is an accountant by profession. He is an exceedingly well-informed, successful insurance executive. He now is the president of his company. He has this little agent in Oakland writing this automobile finance business who is broke. A \$50,000.00 check bounces two weeks before. He has owed him \$7,000.00 for two months. He has brought his general counsel out to Oakland. He does not ask him what the condition of his affairs are. He doesn't ask him how much he owes other companies. He said he was not interested in how much he owed other companies. He did not care where they got the money. It was not his problem.

Now, let us see what the undisputed facts are about that [1106] meeting in Oakland; he was there for two days, remember. We have the signed statement of three young ladies, two of whom came into this court and testified, and said that they each worked on the books. One was the head of the department. As they remembered Mr. Hart being out

there. They made runs on the adding machines and they made the totals, then some time thereafter, Mr. Hatfield asked them to give them a statement about the facts, and his statement was signed by them, and I am going to read it if I may. December 18:

"During day of August 20th, 1951 while Mr. Mark Hart was in Joe Lotz's office I was asked to furnish him with the following information:

"Total premiums payable to companies; total receivables.

"I spoke with our bookkeeping department in the presence of Mrs. Janice Howard, Miss Lyla Bowman, Miss Faye Roach, and a tape was run to furnish the above requested information. To the best of my recollection the below figures are approximately correct:

"Total Premiums Payable: \$287,000.00.

"Total Receivables: \$75,000.00.

"The following day, August 21st, 1951, I was asked to compile a listing by policy number, name of insured, amount of premium, and by individual agents, the unpaid [1107] American Fidelity and Casualty Company accounts receivable—This information was compiled by Miss Roach and Miss Bowman of this office and I believe that the figures below is the approximate total amount, by agents, of American Fidelity and Casualty Company's Receivables:

"Total A F & C receivables equal \$51,000.00.
(Signed) Ralph L. Smead.

"12-18-51.

"The undersigned recall incidents set forth in the

above statements of Ralph L. Smead with the exception to verification of amounts involved.

“(Signed) Faye Roach, Lyla May Bowman, Janice S. Howard.”

Miss Roach, the same young lady, identified the very exact copy of the agent's balance which was prepared at that time. She identified her own memorandum in her own writing which says, “This is a copy of the recap of all American Fidelity and Casualty Company unpaid items as per Ralph Smead's request August 20th. Copy of statements were given to Mark Hart. Faye Roach.”

Let us take another aspect of that thing. They brought Mr. Sam Feller out here, the general counsel. He spent an entire day at the bank trying to get Lotz a loan. Now, if we are going to believe Mr. Hart's version of that Oakland meeting and trip, [1108] we are going to have to assume that Mr. Feller was at the Oakland bank an entire day trying to get Lotz a loan without one scrap of paper as to Lotz' financial condition. To me that is the most incredible narration that I have ever heard. How in the world could they expect a bank to loan Mr. Lotz \$50,000.00 if they had no information as to what his financial condition was. What are they going to loan it on? Mr. Hart said they were going to loan it on his credit on their books, but no bank is going to make a loan to a borrower if they do not have a financial statement, if they do not know how much they owe the public generally. They might owe the public ten times the amount coming from American Fidelity.

Mr. Feller might have been sufficiently uninitiated to go over there in the morning and start to talk about a loan, but he would not have stayed there long because they would have told him to go back and get some figures, but he stayed there all day long and he never had one scrap of paper, according to Mr. Hart and Mr. Feller to support the application for a \$50,000.00 loan for a little Oakland insurance agent out here.

Now, what is the importance of this thing? I think this is a key point in this case. First, because it demonstrates that Mr. Hart did not give this Court a very accurate report of what occurred. Secondly, if he had to admit that he had these documents or had this information, it would show that he had only \$71,000.00 coming on business that Lotz had written for [1109] him, and there wasn't any possible way in which he could have received \$250,000.00 from Mr. Lotz except by invading the premiums of other people. That is the importance of that little discrepancy in what he says the facts are and what these young ladies say the facts are. I am not going to say what the interested parties said. I am going to rely in this instance upon these totally disinterested young ladies, who do not care a whit about this case or any of the parties in it, have not been employed there since 1951 or the beginning of 1952. Mr. Hart could not possibly defend his case without denying that he knew that he only had \$71,000.00 coming from Lotz, because it would have been just obvious that he had to get somebody else's money to get paid \$250,000.00, but that is the fact,

and he got paid \$250,000.00 and he got it partly by taking other people's money and he got it partly by foisting off some of his business on Mid-States when Lotz was broke. He knew it and they did not.

I say a turning point in this case is the action of Mr. Hart and Mr. Feller when they came to Oakland August 20th.

A very peculiar circumstance, one to show how people involved in these things overreach. They were not satisfied with all of this. They entered into this unholy contract with Mr. Lotz, and they appointed Mr. Smead their agent thereafter in all supreme authority in all financial matters. That was the most stupid thing they could have done, and I am surprised [1110] that a Park Avenue lawyer from New York would fall into such error, because after that date the Public Service deal was handled and processed and completed, and monies were misappropriated, the other premiums of other peoples were paid to the American Fidelity, and in every minute of every day Mr. Smead, in performing those acts, was the agent of Mr. Hart and his companies, The American Plan and the American Fidelity, and every minute of every day they had knowledge through him of what was being done, and they are charged under the law with liability for his acts if they are wrongful acts, because he was their agent and his knowledge is their knowledge, and if they are not convicted on any other piece of evidence, they are convicted upon the contract that gave Mr. Smead supreme authority over Mr. Lotz' financial affairs after August 20th, be-

cause that was when this skulduggery began and it was carried on up until October.

Mr. Smead says Mr. Hart employed him after they got themselves paid out, and it is true he did. He admits he employed him for six months because he said he couldn't find anyone else who could do this particular work that was so complicated, and so technical. We found somebody else. We did not have to hire Mr. Smead. We found employes who could close this thing out. But he employed him, and within six months after his employment he promoted him to Pacific Coast Manager of the American Plan Corporation. Is that the action [1111] of someone who repudiates and brands as false and untrue the statement that Mr. Smead made? He must needs have had a very bad opinion of Mr. Smead to give him the Pacific Coast responsibility for his company. He continued him on his payroll until he gave his deposition and testified in the bank case favorably to American Fidelity and Casualty, and then he no longer needed him.

The timing in all of this is highly important. It happened fast. It happened all within a very short period of time. Mr. Hart was on top of it from the very minute it started. The evidence of insolvency stands unimpeached. We have the testimony of Mr. Horton and we have his balance sheet showing Mr. Lotz' insolvency in July. He was insolvent in November, he was insolvent in October, and he kept getting more insolvent as Mr. Hart took the premium income and by September 17th—that was August 22nd to September 17th, less than a month—

Mr. Hart had received \$140,000.00 from the Lotz agency—cash.

Where did he think the balance of the money was coming from? Even on his own statement he says he had \$140,000.00 or \$150,000.00 coming from sub-agents. On his own statement where did he think the balance was coming from? He said he did not care. He did not inquire. As he told them in New York, he wanted to get paid and that he didn't care how, and that is exactly what he did. When he made the arrangement with Mr. Lotz [1112] to pay him \$250,000.00, when he made that arrangement on August 22nd under this contract to pay him \$250,000.00 by September 15th, less than a month away, he knew that not only Lotz could not do it, but that he could not do it conceivably out of premium monies that belonged to the American Fidelity and Casualty because they would not become due that fast, even if they had that much money on the books. They would not conceivably come due that fast because they were not all written in one month.

I see it is ten minutes after eleven.

The Court: I was waiting for that.

Mr. Garrison: Thank you.

(Recess.)

The Court: You may proceed.

Mr. Garrison: That brings us now through October, through September and payment, as I said, of \$140,000.00 by September 17th and some more in the latter part of the month, and it got the parties down to the point where they had it all paid off except \$161,000.00. I assume the bottom of the bar-

rel had been sufficiently scraped at that point so there was some other device needed to clean up the balance. So the suggestion was made that they repeat the Public Service performance, and in this instance take a block of business that had been written in the American Fidelity and Casualty, and for which the insureds had already paid the premiums and funds dissipated, [1113] and take that business and the liability attaching to it and transfer it over onto the books of the Mid-States Insurance Company, and then let the Mid-States look to Mr. Lotz for premiums.

Bear in mind this occurs later in the year after all of these other activities, when Mr. Hart has all of this knowledge of the affairs of Mr. Lotz, has complete familiarity with their efforts to raise money and what they had done with Public Service and so on, and the Lotz agency had been absolutely squeezed dry, so they undertook then this so-called American Fidelity and Casualty Company rewrite.

Let us see how good their performance is in this transaction. Let us see how fair, how honest, how frank their dealings were with the parties in this instance and compare them somewhat with their previous performance. You will remember there was some exchange of calls between Smead and Hatfield, interesting Mr. Hatfield on behalf of Mid-States in some business, and then there were the teletypes between Hart and Smead, and finally Hart said, "I will find Hatfield myself." And by a fortunate circumstance, the wily Mr. Hart had the telephone conversation monitored or recorded, and under our or-

der to produce accommodated us with a transcript. I read it to Your Honor and I won't read it again in detail, but you remember how they started out with a friendly exchange of views about meeting again in a few days at some convention of [1114] insurance people and then they got down to a discussion of the deal, and Mr. Hatfield asked Mr. Hart whether or not Hart had kicked Lotz out of his company as an agent. You remember I asked Mr. Hart about that and Mr. Hart said he told Mr. Hatfield, "No, we didn't kick them out. Of course not, Jerry."

And I said, "Why did you tell him that?"

And he said, "Well, because it was true, because we had terminated the relationship by mutual consent, so I was accurate in saying that we had not kicked him out."

I asked Mr. Hart if he thought that was a fair answer, and he said, "Yes."

The significance, of course, is that had Mr. Hatfield any intimation that they had terminated their relations with Mr. Lotz for any reason, actual or otherwise, he would have been put on notice and inquiry as to why Mr. Hart wanted to get rid of some of their business.

He said, "No, of course not, Jerry." That, I say, is a half truth, to give it every possible benefit of the doubt.

Another positive misrepresentation in that telephone conversation by Mr. Hart is the question of when the business was written that was going to be transferred to the Mid-States Company. Mr. Hart

told Mr. Hatfield that the business was written in September, when he knew that he had cancelled Mr. Lotz' agency contract in August and had turned up the policies. [1115] But he told Mr. Hatfield that the business was written in September.

Now, the significance of that is that it led Mr. Hatfield to believe that they were still doing business with Lotz in September, that the business was very current business and had just been written under the normal and regular relationships of the company and its agent.

Page 8 of this message, starting at page 2, rather, the first reference:

"Mr. Hatfield: Yes, how old is it?

"Mr. Hart: September.

"Mr. Hatfield: September?

"Mr. Hart: September, and there are some August. But you see the September business is not due under our contract. We have seventy-five days.

"Mr. Hatfield: Sure.

"Mr. Hart: Actually until December 15th."

Mr. Hart said he made a mistake. Now, I could understand how he made a mistake if he simply used the term "September" in place of "August." But he did not do that. He not only used the term "September" in place of August", but he went on to compute the time when the premiums would be due: "Not until December 15th, seventy-five days." And then at the close of the conversation, on page 8, he makes this parting comment to Mr. Hatfield by saying, [1116]

"Mr. Hart: Some of them will go back to Aug-

ust (referring to the policies)—some of them will go back to August,”

meaning that they were written in September but some would go back as far as August. That, Your Honor, is a moving, active, positive misrepresentation of fact that induced Mr. Hatfield to act.

Now, let us see what he said about the business that was going to be taken over. Page 6 of this conversation, this exchange occurs.

“Mr. Hatfield: All right, Mark.

“Mr. Hart: We have a loss ratio. Now let me point this out. He has written with us \$355,000.00. He has only earned about \$100,000.00.

“Mr. Hatfield: I see.

“Mr. Hart: So it is not seasoned yet. You see, we get in on the tail end.

“Mr. Hatfield: Yes.

“Mr. Hart: And his loss ratio is in the low 70’s.

“Mr. Hatfield: Low 70’s?

“Mr. Hart: Yes. Now it is improving.

“Mr. Hatfield: It is improving?

“Mr. Hart: Yes, it has every indication of improving. We have one of his accounts that has a [1117] 46% loss ratio.”

Let us see what the fact was when he made that statement. This conversation occurred October 31st, and I am referring now to Defendant’s Exhibit N, which was introduced by Mr. Marks, and in October his loss ratio was 77.13. He says the loss ratio is in the low 70’s and is improving. Let us go back three months and see how much it improved. In August it was 74.03, in September it had increased to 75.96,

and in October it was 77.13. So instead of improving it was getting worse. In November it went up to 84, the next month, and in December it went up to 87. It never was in that period in the low 70's. It was not improving, it was getting worse. That, your Honor is a moving, active, positive misrepresentation of fact that induced Mr. Hatfield to act, and all of this time Mr. Hart knew that Mr. Lotz was hopelessly, piteously insolvent, that he had to squeeze, squeeze and squeeze, that there was not a red cent left.

That, we think completes the three points I mentioned: The insolvency of Mr. Lotz, the breach of Mr. Lotz' agency obligations to his principals, and the knowledge and participation by Mr. Hart.

The only item remaining, the fourth item, is the question of the Plaintiff's loss. No one disputes that Mr. Lotz owes the plaintiff's here \$281,746.00. That is in evidence by agreement without objection. That is their out-of-pocket loss, [1118] held down in every way that they possibly can, but simply the residue left after they cancelled the business, paid the losses, and returned the premiums to the assureds, starting out with \$417,000.00 at the end of December 1951, and going on down to the present day. We say that that loss is owed us, first by Mr. Lotz as our agent and then under the law, secondly by any person who participated with him in his breach of his duties, to us.

I am going back just a few minutes, if I may, to talk about the law. I said earlier that this is not a legal problem. I know Your Honor has tried a great

many of these cases and you know more about the law of an agent's duty to his principal than I will ever know, and I am not going to burden you with a lot of citations of authority. But it is important in this case that we have in mind the two theories under which we feel we are entitled to recover against all of these defendants, the first one and the simplest and the easiest one for me to grasp is the simple proposition of the duty of an agent to his principal. That duty is a fiduciary one, and that agent is required to render to his principal certain elementary, fundamental things. First he has got to engage in fair dealing to his principal. He has got to make a full disclosure to his principal of any facts that might affect the principal's decisions. He has got to account for any profits that he makes. He can't make any secret profits. He can't pay off his [1119] accounts to the detriment of his principal. He cannot at any time act adversely to his principals. Those are so elementary I am not going to burden you. I think the best discussion of his duty is the discussion of the District Court of Appeals in the Rattray v. Scudder case, 28 Cal(2) 214. Then, of course, there is the Wafford case, 68 Cal App, in which this whole field of law relating to the duty of an agent to his principal is discussed. I have here a whole list of cases. One I would like to mention is this, a case involving another insurance general agent, Maloney vs. Rhode Island Insurance Company, 115 Cal App (2) 238, in which they talk about the duties of the agent to his principal. And it makes no difference that the agent might be acting at the

moment for two principals. If he represents two principals the law says he has a bounden duty to disclose to each anything that might affect his actions for the other. So that the fact that in this instance Mr. Hart of the American Fidelity and Casualty were principals along with the Mid-States makes no difference. They cannot act for their benefit to the detriment of the other principal. So that under the cases, under the law, under Section 1730 of the Insurance Code, there just cannot be any question but that Mr. Lotz has a liability for any breach of his duty to principals. The relationship is established by a formal contract that is set out in detail. It is very current. Executed in September of the year, just before this [1120] case occurred. It was negotiated and it is of the highest formality.

The next question is what is the liability of the American Plan and the American Fidelity in their actions in this case. Your Honor knows so well that it would not require citation of authority that any person who participates, whether he benefits or not, any person who stands by with knowledge that the agent is breaching his fiduciary obligation to his principal and who benefits becomes liable just the same as does the agent. And it makes no difference whether the agent has a fiduciary responsibility or not. It is not necessary that the third person have a fiduciary responsibility. In this case of *Shallow vs. Ketcher*, 108 Cal App 21—incidentally, that is the one case I might have the temerity to suggest that Your Honor look at—in that case neither the plaintiff nor the meat company were fiduciaries of the

defendant, Lewis. They were simply victims of Lewis' activities, and by reason of his action and his knowledge of the action of the meat company and his participation in paying himself to the exclusion of the plaintiff out of the plaintiff's funds, the Court said he is liable although there is no fiduciary relationship between either of the defendants, Lewis or the meat company.

The second theory under which we believe we are entitled to recover is peculiar to this case because Lotz was an insurance agent, and under Section 1730 of the Insurance Code, because of the public policy involved, the insurance being affected by the public interest, Mr. Lotz had, as an insurance agent, even a greater fiduciary responsibility than does the average agent because of that public interest, and the law impresses upon premium funds coming into his hands the character of trust funds.

The distinction I make between the first principle of law involving the liability of the agent and this one, involving trust funds, is designed to avoid any question about the idea of tracing funds or the fact that we might have a duty to show particular funds or the contention that Mr. McKinnon is going to make that this was a debtor-creditor relationship, a trustee relationship, the trust aspects had been dissipated—and those things, while being present in this case, are not necessary to a recovery. We do not care whether they were trust funds or not. We do not care whether Lotz was a trustee or not. The only thing we argue is that he was an agent, that he got our money, that he violated his duty to us,

and he gave it to the defendant, Hart, Hart, knew it was our money and benefitted to that extent. The attorney general in his opinion in this States, Volume XVII, page 11, has reviewed this whole subject of the duty of an insurance agent. He talks about the commingling of funds. He talks about delayed payments by the agent to the principal and finds the conclusion with citationable [1122] authority that those things are not incompatible with the trustee aspect of their relationship and has nothing to do with it. They do not destroy it. So while we contend that Lotz was a trustee, that the funds were trust funds, we also say that that is not essential to recovery in this case, and we did not want during this trial to get involved in an argument about whether we could trace funds or whether there was a creditor-debtor relationship or not. That is not the basis upon which we believe we are entitled to recover. It is the breach of an agent's duty. I submit to Your Honor that if the agent breach his duty under this contract, if Hart participated with him and benefitted by it with knowledge then we are entitled to recover against both of the defendants, all of the defendants. Thank you.

ARGUMENT BY COUNSEL FOR THE INTERVENOR

Mr. McCallum: I presume, Your Honor, in the order of events I will follow Mr. Garrison.

The Court: Yes.

Mr. McCallum: This is the first time that I have

risen to address Your Honor that Mr. Bronson or Mr. McKinnon have not risen to object.

Mr. McKinnon: Perhaps if Mr. McCallum will be patient we will be able to accommodate him, Your Honor.

Mr. McCallum: First, Your Honor, let me say why the bank is involved in this case. We are in this case because of eight [1123] checks. These eight checks total \$97,421.34. Of these eight checks there were five of them that came from the Public Service Company and they total \$94,136.69. The remaining three checks only total a little over \$3,200.00, two of them coming from one individual and the third coming from another later in the order of time and events. So you see the bank's position in the particular case is involved primarily because of the acceptance of the Public Service monies and the deposit of those checks with the Anglo Bank by Mr. Lotz in his trustee account. Of that sum representing these eight checks, \$97,000.00, we have paid to the Mid-States \$37,500.00 of those \$97,000.00 that they claimed against our bank.

Let me begin first by relating the facts as they directly pertain to the bank. I think we should start on August 22nd 1951. At that time Mr. Lotz had an account with the Central Bank. It was on that day when Mr. Hart and Mr. Lotz and Mr. Smead went to the Central Bank and at that time Mr. Smead was appointed the sole and exclusive agent of the American Plan or the American Fidelity Company. I think Your Honor can remember these exhibits if I just identify them by their substance.

On October 30th we find some reference in the teletypes to the fact that the checks are coming in made payable to Mid-States and they are having difficulty in cashing them. Before that teletype, however, on August 27th—that is five [1124] days after Mr. Hart was in the Central Bank—Mr. Lotz wrote a letter to the Mid-States Insurance Company, that is the letter where he says, “Now, Gerald, this bank I am doing business with wants a resolution from you that I can endorse checks.” He is still dealing with the Central Bank, and this is five days after Mr. Hart was there.

Then we have the teletype of August 30th indicating trouble. Now, before Mr. Hatfield replies to Mr. Lotz’ letter of August 27th, Mr. Lotz goes to the Anglo Bank on August 31st. If I may repeat, on August 27th he wrote for authority. On August 30th the teletype shows they were having difficulty getting these checks cashed because they were made payable to Mid-States. There is also some reference to a telephone call in that teletype by Mr. Hart to the Central Bank.

The following day Mr. Lotz goes to the Anglo Bank, opens the account, and in response to the bank’s inquiry tells him he has authority to endorse checks payable to Mid-States.

On September 5th Mr. Lotz gets a letter from Mr. Hatfield which says they can’t give him the authority to endorse, and then that letter was followed up on September 10th explaining further why they cannot give him direct authority to endorse.

In between those two letters Mr. Lotz on Sep-

tember 8th wrote Mr. Hatfield and said, "Now, regarding my request for authority to endorse checks made payable to Mid-States, we do not have very many like this and those that we do have we can [1125] have them made payable direct to me."

We submit that was written by Mr. Lotz to allay any suspicion in the mind of Mr. Hatfield as to what was going on out here with respect to checks made payable to Mid-States Insurance Company.

Let us see what he actually did during that period of time. On September 7th the first Public check of some \$5500.00 was cashed by the Anglo Bank. That was after Mr. Lotz received Mr. Hatfield's first letter saying he did not have authority. On September 14th he deposited the check for \$67,500.00 with the Anglo Bank made payable to Mid-States. That is after he got Mr. Hatfield's second letter saying he could not have authority to endorse, and after he wrote Mr. Hatfield saying, "You do not have to worry because we are not going to have checks made payable to Mid-States that we can't turn around and have made payable to us."

Then following through, on September 24th, \$11,250.00 was deposited. On September 28th \$3750. October 15th, a little over \$6,000.00. Then on November 16th and October 13th these other \$3200.00 worth of checks. But every single one of the Public Service checks and every single one of these other three—in other words, all eight of these checks in which this bank was involved—were deposited with us after Mr. Lotz had received notification from Mr.

Hatfield on two separate occasions that he did not have authority to endorse the checks. [1126]

Remember also that not only was Mr. Lotz telling the Anglo Bank that he had authority to endorse these checks, but so was Mr. Smead. And Mr. Smead, at the time he told the bank, on several occasions during this period of time, when Public Service monies were being deposited, that Lotz had authority to endorse. He had already been appointed the agent of the American Fidelity or the American Plan Company, and Mr. Hart, in response to my question testified that when Mr. Smead told the Anglo Bank that Lotz had authority to endorse those checks, he was acting as their agent, and Mr. Smead also admitted that he told the Anglo Bank that Lotz had authority to endorse, even after he had gotten Mr. Hatfield's letter saying he did not have authority.

So we have the direct misrepresentation of both Mr. Lotz and Mr. Smead telling the Anglo Bank he had authority to endorse these checks, and then, of course, we have the actual endorsement on those checks and a deposit in the bank.

Now, why? Well, Mr. Lotz and Mr. Smead did not get the money, so we cannot presume from that that they told the bank these falsehoods because they wanted to gain something for their benefit. The truth of the matter is they told the bank these falsehoods because they wanted to get the money to pay it to the American Plan, and the best evidence of that is what they did with the money after the Anglo Bank cashed those checks for them. [1127]

On September 11th Mr. Lotz had in his account a little over \$15,700, and of that \$15,000, \$5,500 of that represented the first check he received from the Public Service Company. On it he paid American Fidelity \$15,000. These are the figures that Mr. Marks corroborated on my cross-examination. So of that \$15,000 that was paid to the American Fidelity on September 11th, some \$5,500 of it came from the first check of the Public Service monies.

On September 15th Mr. Lotz had on deposit \$74,472. Of that \$74,000, \$67,500 came from the large check from the Public Service Company. So we have the difference there of his own, or whatever were not Public Service funds, of the difference between \$67,500 and \$74,000. On that date he paid \$60,000 to the American Fidelity Company. So a very, very substantial amount of the second or the third largest check of \$67,000 went to the American Fidelity Company.

On September 26th he had had \$17,000 odd in his account, and of that there was \$11,200 received from the Public Service Company. So he had of his own or from non-Public Service funds the difference between \$17,000 and \$11,000. And on that date he paid \$15,000 to the American Fidelity Company. So a very substantial part of the \$11,000 that he got from Public Service went to the American Fidelity Company. Now, that is where the bulk of this money went.

The Court will recall that at the outset of this case [1128] Mr. Bronson made the very direct remark that he was going to prove to this Court that

every dime that the American Fidelity Company received was their own money, and I even recall that he turned and said to counsel, "I want counsel to understand that point as well." And I presume the reason why Mr. Marks was put to the task of trying to prepare a statement to show that Mr. Lotz during this period of time received sufficient funds from other sources—by that I mean sources other than premiums belonging to Mid-States Insurance Company—that they could have paid their bill in full.

Your Honor will recall that Mr. Marks admitted that that was a problematical statement. It was something put together on facts he had gotten from the record. It did not reflect the true facts. It does not, therefore, jibe with the statements which I just made to Your Honor, showing you how the monies went into his account and immediately were then turned over and paid to the American Fidelity Company.

So there can be no doubt, no question whatsoever that the American Fidelity Company received, so far as the bank is concerned, a very, very substantial proportion of the Public Service funds.

I do not want to go over what Mr. Garrison has done, but I think in support of the bank's case I ought to pass some remarks concerning how it fits into the whole picture. I think there is a key to this case. If we can grasp it, I [1129] think it will unlock the entire circumstances for Your Honor. I think this key is made up of four different things.

The first thing it is made up of is what happened

in New York when Mr. Lotz went back and talked to Mr. Hart. Now, if when Mr. Lotz was there he had only \$75,000 receivable and was only talking about borrowing \$50,000, that would make a total of \$125,000, and he admittedly owed American Fidelity \$240,000, then most conceivably the only source from which Mr. Hart could expect to get his money in the future would be from writings from other companies.

The second key or element that makes up the key is this act of non-concern on the part of Mr. Hart. A week later he is in Oakland with his general counsel, speaking to Mr. Lotz and Mr. Smead about the indebtedness to his company. Mr. Smead at that time says it is \$75,000. If I were the president of the American Plan Company looking for the collection of monies due to my company, and I had been told a week earlier that it was \$150,000 and was now being told it was \$175,000, I believe I would be most concerned about that circumstance. And even if that day or the day following, my general counsel went to my debtor's bank to negotiate a loan for \$50,000, when I had been told that he was negotiating for \$100,000 the week before, I would be doubly concerned over those circumstances, because then a week later I would know that was not \$100,000 to be borrowed and \$150,000 in receivables to pay my [1130] clients and my principals' indebtedness.

I think also that this picture of non-concern that Mr. Hart gives to us just does not fit in with the character of the individual. Remember that when Mr. Hart called Mr. Hatfield to talk about the

transfer of the \$60,000 odd thousand of insurance to the other company, he was very cautious. He had the conversation made of record. That is the act of a very, very cautious man.

Then there is in evidence before Your Honor a letter which Mr. Hart wrote to someone in his organization, some two or three pages, pointing out and justifying under all possible circumstances how his own company could report to any inquirer that Mr. Lotz was current. That again was the act of a most cautious and careful man. And so I repeat that if Mr. Smead told him it was \$75,000 accounts receivable and Mr. Feller reports back two days work trying to negotiate a \$50,000 loan, that would leave a very substantial amount from which there could be no source to get payment, and a man as cautious as Mr. Hart would be more than concerned.

I think the third element that goes into this key is the relationship between Mr. Hart and Mr. Smead.

Mr. Bronson took Mr. Hart through the whole statement, and Mr. Hart denied all the things in the statement that pertain to himself as a conspirator or his company as entering into any plan or conspiracy to pay Mid-States in preference [1131] to any other company. He admitted everything else in the statement.

As a consequence to those statements Mr. Smead had charged Mr. Hart and his company as being a conspirator and a deceiver, and, I suppose you may say, a cheater. If I were going to hire someone to look after the affairs of my own company, I do not

think I would hire a man who had branded me as a conspirator, a cheater and a deceiver. And again how does Mr. Hart justify it? He said he was the only man available out here. It does not seem that the only man available could be the man that called you a cheater, a deceiver and a conspirator.

Let us go further. He said he had to have him for a short period of time until the American Fidelity's business was taken care of. When that work was all done he turned around and he said in his own words, to give Ralph Smead a chance, they appointed him as his own company's Pacific Coast representative.

How does Mr. Hart justify that? How does he justify appointing a man as Pacific Coast representative of his company who has accused his company of being a conspirator, a cheater and a deceiver?

The only explanation I can offer to Your Honor is that Mr. Hart, being a very, very cautious man, wanting to keep everything under control, kept Mr. Smead there so he could [1132] control his future conduct. And that is what Mr. Smead has told us.

Mr. Smead has taken the stand, and I expect that Mr. Bronson is going to call him some names such as a perjurer and a liar, and has told Your Honor, under the influence of Mr. Hart, he endeavored not to tell the truth directly and wholeheartedly on previous occasions because of the influence and domination of Mr. Hart.

Now that that domination and influence is gone, Mr. Smead has come before Your Honor and admitted the facts to whatever consequences may flow.

Your Honor, I realize it is 12 o'clock and I probably have another five or ten minutes. Would you like me to continue or shall I step down?

The Court: I will let you decide that.

Mr. McCallum: If you will grant me five minutes more, perhaps I can complete.

The Court: I will give you ten.

Mr. McCallum: Thank you very much.

Those four elements, then, the fact that Mr. Hart knew there was not enough money available to pay his bill, the fact that he must have been concerned when he came out here in August a week later, and the relationship between Ralph Smead and himself, and the fact that Mr. Hart is by nature a much more conservative man and more concerned over collections [1133] than he has given the Court to understand here, are in my opinion the four elements that go to unlock this case.

I think if they are put together they make the key.

As far as the Anglo Bank's over-all position in this case is concerned, Mr. Bronson and Mr. McKinnon have suggested to Your Honor that the bank was negligent, and therefore since it was, since it was their own negligence, they have no concern over the loss or damage the bank has sustained.

The factor of negligence is not involved in this case. A person who comes to any other person and makes a direct representation and expects that other person to rely upon it, cannot afterwards come forward and say: "Well, you should have known better. You shouldn't have believed me. I lied to you.

You had no reason to believe I was telling the truth and you were negligent to think so."

If that premise of law were true, you could never have an action for fraud. As between the Mid-States Insurance Company and the bank, yes, the question of negligence was an important factor. But where Mr. Lotz, as the general agent of the American Fidelity and Casualty Company and the American Plan Company, and Mr. Smead as a duly appointed agent in charge of all his financial position, come to the bank and make a direct misrepresentation, the American Fidelity as the principal cannot now come forward and say: "Well, the Anglo Bank was negligent because they relied on Mr. Smead's and Mr. Lotz' [1134] statement."

The Anglo Bank could have done one thing they did not do. They could have written a letter to Mid-States Insurance Company. But the law is pretty well established that a person dealing with an agent may accept the representation of that agent as to the extent of his agency, but would be bound by it if the agent himself did not have the true facts as he gave himself to the third person relying on them.

As between the bank and Mid-States the question of negligence was an important factor, but as between the perpetrators of the misrepresentation, of the parties, the principals and their agent in making a direct representation cannot claim the bank was negligent and they relied upon it.

The bank claims that as a result of having been brought into this litigation because of this \$97,000 odd, it has paid to the Mid-States Insurance Com-

pany \$37,500 of that \$97,000, and if this Court should find that \$97,000 is owing from the defendant to the Mid-States Insurance Company, then the bank is subrogated to the \$37,500 of that amount of \$97,000, and I presume in equity, if this Court should find that fifty per cent of that \$97,000 is due to Mid-States, then fifty per cent of \$37,500 is due the Anglo Bank, and we would stand on the percentage of that portion.

The Court will recall Mr. Hatfield advised Your Honor that we had paid them \$37,500 of the \$97,000 involved. It [1135] should make no difference to American Fidelity or American Plan who they pay this money to if in fact they are liable, whether they pay it to the Mid-States or the bank. They are paying no more than they would otherwise pay depending on the judgment of this court.

I hear counsel say, "That is specious." Then this would follow from that: it would be intolerable, I think, in a court of justice for counsel now to come forward and claim they are entitled to credit of this \$37,500 that the bank paid to the Mid-States Insurance Company. They will claim, and they have already taken advantage of that payment because between the two of them they have admitted there is a certain amount of loss to the Mid-States Insurance Company, and that loss has now been computed, after allowing for the payment of the \$37,500. If that were the figure that were awarded the Mid-States Insurance Company against these defendants, they of course would have got the benefit of the \$37,500, a credit against an institution that

their own agent deliberately and willfully misrepresented the facts to be.

Thank you, Your Honor.

The Court: We will take a recess.

(Recess.) [1136]

Mr. Bronson: If the Court please, I am addressing myself to the fraud issue and other matters of law and fact I have asked Mr. McKinnon if he will address you upon, so we will split the argument in that way if we may.

Using an expression Mr. Garrison used, Your Honor, in his opening statement, he said that the plot of which his clients were a victim must have been lifted bodily out of a dime novel. He has some blackbearded ruffians coming out from New York with pistols in their belts and simply taking these poor little short pants fellows at Chicago, taking their little red wagons away from them, and we do not think it happens that way in real life, and I think the facts will show otherwise here, at least not with this kind of Chicago boys.

If Your Honor goes to the part of the testimony which is uncontradicted, it will appear that the rating was done in December 1951 out here in Oakland, and the raters were the little boys from Chicago, if I may be pardoned for the use of the expression again, and they ended up with what you might call the whole ball of wax, including the key to the mailbox.

I want to go back before that date, though, to trace the relationship of these people to 1949 and 1950.

The evidence shows that these men from Chicago were very, very hungry for premiums. Joe Lotz, it was found, was a very [1137] good producer of business. His business was growing by leaps and bounds, and Joe was pressed to the limit. The business, as Your Honor knows, came almost entirely from car lots, from out of town or uptown finance companies, and from soldiers, colored people, and the rest of that kind. It was sub-standard risks but it was super-standard premiums. The risk was calculated as high as 175 per cent of the manual rates for similar coverage so right at the start we have a situation where it was not the General Motors Acceptance Company type of business. It was not the insurance on the dowager's Packard car who has a careful chauffeur driving her around, and Joe was getting woefully behind in his business.

It is our contention, and we can prove in this case, as we have, that the Mid-States knew all about it. They inspected this account monthly at the least interval, men going in, officers of the company, two or three days at a time, not a quick look-see, but, as Joe Lotz said, with their coats off and their shirt sleeves rolled up, and every single day they got their dailies.

I say that for the Mid-States to play ostrich in this court room is a sham that does them very little credit. They were reckless in their hunt for premiums. I read to Your Honor from a letter written by Mr. Titus, the President, to his Vice-President out here, a man named Dick Cass, as early as the middle of 1950, a year and a half before the de-

bacle, [1138] seven months before they ever wrote a premium for the American Fidelity and Casualty Company, and Titus said, "You have got to watch this account on a day-to-day basis."

What was the scribbled response of Mr. Cass at the bottom of the letter? "Joe Lotz is worried", he said, "but we don't have to worry, not from our point of view." Those were his words. He said, "I will try to improve their loss ratio by ten or fifteen points."

In other words, dip into today's premiums to pay off your old obligations. I do not intend to bore this Court with too much of the Cass deposition, but some of it is most important in the contention of the plaintiff in this case that they were utterly ignorant of what was going on out here, the chances they took, and the financial condition of Joe Lotz. He said that he had supervision—I am reading from page 4—to a limited extent over Joe Lotz' account and subject to the president of the company at all times.

He was asked, did Martin Donnelly—that was his predecessor—tell you whether Lotz had a capital of his own?

"Answer: He told me that Lotz, as far as he could ascertain, did not have any capital other than his personal effects," clothes on his back, as it were, Your Honor.

Again he was questioned:

"Under the retrospective plan which was [1139] incorporated in this agency agreement did the

agents have to remit to the company 100 per cent of the premiums collected?

"He did.

"Question: Did the agent have to carry on his own any expenses that were incurred in the running of the agency business?

"Answer: They were the sole burden of the agent.

"During this interim period was he permitted to or did the company know he used the money for operating expenses and paying any sub-agents?

"Answer: There was knowledge of such facts, yes.

"Question: Did you personally look into the books of Mr. Lotz?

"Answer: I did.

"Question: Did you from a review of these books see what he paid commissions to a sub-agent?

"Answer: I did."

He was asked to elaborate on the question of his lack of capital, and Mr. Cass said in his deposition, when his writings were two or three thousand a month, his sole source of business was the Bank of America. He had practically no expense or overhead because all the work was performed by himself and family. When he started to grow beyond that position his need for work capital grew. He knew all about it during the period [1140] '49 and '50, he said, he secured his working capital by borrowing against deferred earnings.

"Question: By borrowing from whom?

“Answer: In effect borrowing from the company in this manner.”

He would make certain collections, not all premiums, but certain premiums would be collected as written. There would be an interim period from that time until the due date to pay the company. You see this developing.

“Question: He was borrowing against this asset by using part of the premiums collected?

“Answer: That is right.

“Question: Was Lotz delinquent in paying his bills during that period that you supervised his account?

“Answer: There were frequent times when he would be late paying his premiums.

“Question: You would watch the account particularly to see that he did not get very far behind?

“Answer: Very closely.

“Question: At that time did your duties include supervision of the accounts of agents after their appointment?

“Answer: Yes, it did.

“Question: How frequently did you supervise [1141] their account?

“Answer: Almost daily.

“Question: In other words, it was a continuous supervision?

“Answer: Continuous supervision.

“Question: How many sub-agents did Joe Lotz appoint during the period that you had charge of the supervision of the account?

"Answer: The company appointed a great many. I would say 75 or a hundred, at least."

That was in 1950. That was the last time this man was in the company.

"Question: That is sub-agents for Joseph Lotz Agency?"

"Answer: At the request of Joseph Lotz."

Finally:

"Question: Now, this procedure of Lotz in using monies collected on account of premiums prior to the date he was required to remit them to Mid-States Insurance Company for operating expenses, was that contrary to any instructions to him from the company?"

"Answer: No.

"Question: You never objected to that on behalf of Mid-States, did you?"

"Answer: Never objected. [1142]"

If the Court please, Mid-States took this man by the hand and showed him the way. They stand in this court room and say those premiums collected and placed in a trustee account by Joe Lotz were inviolate. And here we have the words from the mouth of the man who was out in charge and bore a high position as vice-president of the company in charge of the West Coast literally showing Joe Lotz how to do it, quite the contrary of being a breach of instructions on his part. It was paternalistic. "Use our money as you like. Don't worry. Keep selling," they said.

And finally, as Your Honor knows, from one exhibit that was held up by Mr. Garrison this morning, prepared by one of the young ladies—it took

her two weeks to do it, two weeks following the time Mr. Hart and Mr. Feller were here on the 22nd of August—and I counted them up roughly—there is 125 to 130 sub-agents that were pouring business into that little store over on 14th Street, all of them working on high commissions. And still they claim their head was in the sand—Mid-States.

If Your Honor please, this is a vicious circle. Every business man with experience knows that as your business grows, it is one of the most critical things there is, and who knows more about it than these people in Chicago who have got general agents scattered in all the big cities around the country, for all I know, or at least in every state that they are admitted [1143] to practice in. They see this thing. They have knowledge of it. There is your vicious circle. As your business grows, there are more and more demands for operating expenses. Joe Lotz testified he had 40 or more employees in the store in the fall of 1951, and he said they were still three months behind in the posting.

What happened to him? That cost money to run, and as the agents increased, and as the business increased, there is a stretch of the rubber band until some day it is going to break, and I say that the most hypocritical statement we have heard from any witness on this witness stand is that Mid-States did not know what they were doing every minute of the time. There is only one explanation of it, Your Honor. They were hungry to get business. They were anxious to control the competition themselves.

What do you suppose Titus meant when he said to Joe Lotz—I do not know whether it was in May or in August—that it might have happened. I think it was in August when he was there following the New York trip. He said, “Joe, you are in trouble but we are going to help you. You go on out and get more business and we will take care of it.”

What did he mean by it? He meant exactly the same thing as he meant in the letter that he wrote to Dick Cass in the summer of 1950, the year before, when he said, “This fellow has to be watched from day to day.” And he meant exactly the same thing [1144] as he said in the letter of June of 1951, just two months before he was telling Joe, “You are in trouble.” He said, in an inter-organization thing, “unless we get better representation than Joe Lotz, we are always going to be in trouble.”

And Mr. Mead testified about this, and I want to pause to say this about Mr. Mead, a fact Your Honor may know. He is a lawyer of unsullied reputation. He is an honored and respected member of the Bar, a business lawyer for 25 years, and I should say, in view of his testimony on the stand and the absence of any effective cross-examination of Mr. Mead, he is entitled to every single bit of credit that any person can give to credible person. It is in his manner, it is in his appearance, it is implicated, connoted by his position in the community and in his profession. He said that when Joe Lotz got back from that August trip to Chicago, he was full of the most genuine gratitude to the Mid-States. He said that Mr. Titus was a fine fellow.

They were giving him an additional one per cent. They were cutting down the company's retention from fifteen per cent to fourteen per cent. He told Mr. Mead the words that he had given us from Titus, that, "Joe, you are in trouble but we are going to help you out of it," and they were going to do something more, which was a tremendous concession. They were going to let him carve out fifteen per cent as a prepaid commission before he remitted to the company, a terrific concession to a man who was cash poor. [1145]

Now, it was at this time, beginning in May, and finally in August, that Mr. Titus made his greatest competitive effort. I mentioned he cut down the retention by one per cent, he offered his prepaid commission, something apparently that is not customary in the business. Certainly our people can't do it. But see this important thing. Attached to that fourteen per cent was this. You have got to do a minimum of \$25,000 business a month. You remember the letter.

What is the exhibit number? You get it for me, Mr. McKinnon. Skip it if you do not have it readily. Don't bother. I want to move along.

The Court will remember the letter that accompanied the agreement of September 1st, 1951, written by their Mr. Hatfield or Mr. Titus in which he said, "Now we are giving you an additional one per cent. We are cutting down our retention by an additional one per cent, and I want that understood as being contingent upon increased writings," and they fixed a minimum of \$25,000 per month. The Exhibit

is Exhibit C for the defendant. That is dated May 17th, 1951. I was wrong in fixing it as accompanying the September 1st letter.

"Effective May 1st the Mid-States retention"—this is paragraph 2 of Exhibit C—will be reduced from fifteen to fourteen per cent with this additional one per cent granted in your favor, and trust you will show your appreciation by placing at least \$25,000 per month through Mid-States." [1146]

What did Titus want? He wanted more and more business from Lotz. He wanted the competition ended. He wanted American Fidelity out of there. He wanted heavier underwritings. His float period was now 60 days, far longer than the original 25 days. Why did he give him that, Your Honor? Because they know he had a habit, and they were willing to take that chance in their eagerness to accomplish the work they were about.

Don't forget this Your Honor, it is to be a secret. This letter was read where the signer, Mr. Hatfield, said, "You also are to keep this to yourself. It is a secret. I do not want it out for the competition." And with all of this screaming, if the Court please, about the "Don't tell" testimony, about Cass and about the station-to-station call to Chicago, here is this company swearing their agent to secrecy on a matter vitally affecting its business and vitally affecting its relations with other people, other companies that occupied the same position, soliciting the same kind of concealment that they charged the American Fidelity and Casualty.

I would like to depart from that subject for a

minute and consider the position of the American Fidelity in this affair. Our contract was drawn, as Your Honor knows, in November 1950, but the first underwritings did not take place until January 1951. Our contract gave Mr. Lotz a credit period of 75 days, so that for business written in the first month of the operation for American Fidelity, namely, January 1951, their first [1147] settlement would not be, overdue, until April 15th, 1951. Mark Hart came out here in April 1951, the month in which the settlement was due for his first writings, and he found, Mark Hart did, that he was operating on some sort of a float arrangement which was explained to him, and Mr. Hart said that he condemned it, he told them it was unsound. He told Lotz he should not be doing it. The term "float", Mr. Hart said, was new to him. But Sudekum was out here, too, in July, another officer of the American Fidelity, and he learned the same thing and he condemned it and told Lotz he shouldn't do it.

There is a little incident that is apparently unrelated. There is a check that did not clear for a couple of days because of some uncollected items. It was not an "NSF" check. But stronger in the minds of my clients was the inability of Joe Lotz to meet in August a \$6600 item that was due on some reinsurance transaction. In two or three days a much larger amount relatively, namely, \$66,000 or \$67,000 was due to American Fidelity from Lotz on his May balance.

In other words, on August 15th they would have coming from him for his May settlements that

larger sum. And here the man was unable to meet a relatively smaller sum, only one tenth of the amount. So they phoned out and said, "You come out here to New York, Mr. Lotz." And I imagine it was pretty peremptory. That is where they claim we put on the black beard and the mask and put the daggers in our belts and went about a very nefarious [1148] deal.

Do you know what the source of their information is, Your Honor? It is from a written statement from a character named Smead. It is taken entirely from the December 6th statement written a month later and from addenda that were added to it.

I say this, Your Honor, that we have a right to examine pretty closely the way that statement was taken. Mr. Mead offered some very pertinent testimony on that. Hatfield came to him on the fifth of December. Hatfield had been out here some time before November 27th, that many days ahead, because that is when the assignments were executed. Hatfield came to him and said, "I want to get a statement of some facts of the way this agency has been going. Will you call your client in?"

Mead, the attorney, got on the phone, called his client, Joe Lotz, and said, "They want a statement of certain facts about the way your agency has been operating. You come to my office at ten o'clock tomorrow, December 6."

Mead waited there in an empty office until past the hour. He called up Lotz and said, "What is the matter?"

And Lotz said, "There was a statement written

out last night." They beat him to the punch, Your Honor. But that was a surreptitious act. It was sneaky. It was a night meeting. Smead said he operated on these pages for five hours.

Mr. McKinnon asked him, "Didn't you tell me you were drunk that night?" [1149]

And you remember how he evaded it, finally saying, "Yes, but I had but two beers." It reminds me in passing, Your Honor, of the story of these fellows who are arrested for drunken driving and there is an odor on their breath, and it is always two beers. It has gotten to be something of a mockery around here for an excuse if a man is under the weather. I say in five hours, whatever the alcoholic stimulant was, whatever the influence that was exercised on that man, Smead, it must have been literally sweated out of him. And did you notice how careful Mr. Hatfield was to say he had nothing to do with it? He was in another part of the building and only occasionally he walked by. He anticipated that. He protests a little too much about that. He just occasionally dropped by. He didn't have hold of the man's hand or anything like that.

Who is this man, Smead, to whom Mid-States finds itself married? They put their whole case on Smead, Your Honor, no one else. Well, he is a baby face. He sits there and puts out this information, but what comes from his lips is positively shocking. He wrote those statements out, it is true, but subsequently on three occasions before the Insurance Commissioner, when certainly the American Fidelity and Casualty was not there, and for all I know

Mid-States was not there or had any interest in it, it was up there on some proceedings applying to Joe Lotz' license; and then there was the bank trial and there was the deposition in the bank trial, everyone under oath. He spoke. I am not going to read all I read to him, but I am [1150] going to read some of it because it gives point to what this is all about, what manner of man they are resting their entire case on.

He said in that proceedings, he made the answer to the question whether the statements in there were true or not. That was to Mr. Garrison. Not all the original statements; there were certain small portions of it that might be true, Smead says.

The question by Mr. Garrison:

"The majority of it was untrue?"

"Answer: The majority was untrue and very definitely untrue," was the answer of Mr. Smead under oath in the trial in the bank case.

"——I do not think that that supplement is true either from my recollection. That is something that Mr. Titus and I talked about because he asked me the question. He says he asked Joe if he saw Mr. Cass while in Chicago.

"Question: Did you fabricate all this conversation with Mr. Hart to make that up?"

"Answer: Mr. Hatfield and myself did, yes."

Fine fellow.

Now, Mr. Smead on page 81 of this record,

"Question: Is it true or is it not true that [1151] Mr. Hart told you to deposit those Public Service funds first in the trustee account and then in the

American Fidelity and Casualty account at the Central Bank?

“Answer: It is untrue.”

He is referring to what he wrote on December 6th, two years before, a year and a half before.

“Question: Did you make that all up when you told it to me in my office?

“Answer: Mr. Hatfield and I made up all of those statements, Mr. Garrison.”

Over here at page 118 he reads from the December 6th statement:

“In placing those calls Mr. Hart directed that the calls be placed station-to-station so that the place of origin would not be known in Chicago.”

“Question: May I ask whether or not that is a true statement?

“The Witness: That is not.”

That is Smead, and he is referring under oath to what he wrote in that midnight meeting with a bottle standing on the table, I have no doubt.

Your Honor, the worst of all, to show you the type of fellow they are relying on, is what he said up there in the Insurance Commissioner's office. We had this record prepared, [1152] and he said, “Referring to the conversations in New York when questions were asked and answers given about the financial condition of Joe Lotz Agency as of that date, which was August 13th, 1951, “Well, I remember the discussion we had at that time” (he is telling the Insurance Commissioner's Deputy in the hearing that has for its purpose only the question of whether or not a license is to be continued in the

hands of Joe Lotz)—“I remember the discussion we had at that time. I think we owed American Plan or the American Fidelity and Casualty in premiums written approximately \$240,000.00 or thereabouts. That was the balance at that time and date, with an estimation of how much premiums that had been written in the month of August to that time, and that would be due. Approximately \$240,000.00. Now, as we discussed with Mr.—well, with the gentleman in the American Plan office, our accounts receivable on the American Fidelity and Casualty business, judging from what we had written, should almost cover that.” That is \$240,000.00.

“We realized there was some shortage, although we did not tell the people in the American Plan office that we thought there was probably \$30,000.00 difference.”

That man would lie to anybody. He was supposed to be under our wraps at that time, and he is going up there and telling that he told a lie to us in New York and hid \$30,000.00 [1153] from us. That is the time the fraudulent plan was supposed to have been hatched. Now I ask Your Honor who can believe anything that this creature may say?

Your Honor is asked to decide this case on the basis of just the statement of that man, Smead, nothing else. I do not know what type of person he is. It is a pathological condition perhaps, if you want to be kindly about it, but he is the most perverted person in the world. He comes into this Federal Court, into these distinguished surroundings, into this place and make those utterances, and you

compare him with the arm-twisting he was getting back there on December 6th and the way they took him, this surreptitious manner, circumventing the attorney, and you can take your choice as to which one of them speaks the truth.

And what about Lotz? What have we to say for that man? I want to discuss him. I might say I am happy that none of our clients are here, none of the clients on the other side and Mr. Smead and Mr. Lotz are not in the Courtroom. It enables us to be a little freer in our discussion of those people. Mr. Lotz has been characterized as a salesman, not an office man, not a detail man, and I have no doubt that is true. Another thing about Mr. Lotz, he doesn't want to say no to anybody. He is a sort of a follower of the leader at the moment. He is apparently presently unaware of the contradictions in his own statements. Perhaps he has accepted the guidance of Smead. [1154] Lotz did say that he was ill and nervous and emotionally upset, postponing an operation at the time these things were going on, if it means anything. It seems plain to me that he was completely ignorant of the implications of the technical aspect of his business in accounts and in accounting. But I have no doubt he was working under the influence of Mr. Hatfield and Mr. Smead on December 6th, 7th, and 18th. Do you know what they were holding out to him? The apple of keeping him in business all this time. There was not a word about the cancelling of this agency until Titus got out here. There was not a word about cancelling the agency until they got the assignment of his business

from him and the deliverance of every scrap of paper he had in the place and in the hands of Mid-States, and beyond that there was not a word of cancellation when they were extracting the statement from Smead, but the promise to keep him in business was held out to that poor soul, Lotz.

Do you know what he said to Mr. Mead, his attorney, when Mr. Mead went over finally to the office of Lotz on the afternoon of December 6th? After Smead had done all his midnight work and he had signed it "Lotz" out in the margin or some place, and he said, "Is that your signature?"

"Yes."

These people were yelling for an acknowledgment and Mead said, "If that is your man's signature, I will acknowledge it. He has stated it is his signature and I will fix my notarial [1155] seal." But what did he tell his attorney in the confidences that exist between an attorney and his client?

"Lotz told me he did not know what was in the statements and Mead didn't know what was in them, and he said 'I won't touch them'."

Now, in the interest of a change of tempo, I would like to speak about New York. They say that was the cradle and birth of the conspiracy. You know why they went back there. Here is the fellow who can't meet \$6600.00, when \$66,000.00 will be due in a couple of days. Of course they are worried. They have found that he was operating his business by borrowing monies from the insurance companies. The effect of the conversations there was to allay their immediate fears about it. Joe Lotz knew

Cass. He wanted to see him in Chicago. It was reported by Smead in Smead's statement, "Don't tell those boys in Chicago that you have been to New York." That is stupid, Your Honor. The very next day or the second day after that, when Joe Lotz got into the office of Hatfield and Titus, the first thing he said was, "I have been to New York talking to those guys and they can't match your fifteen per cent prepaid commission."

You know how dear that was to his heart. How stupid. How trivial it becomes. If it is true—and it was denied—it is another piece of the machinations, the clever machinations of Hatfield and Smead weaving some fact in with falsehood and [1156] making the falsehood look like fact by the fact that it is in juxtaposition to fact, an old device.

And while I am on the subject, let me tell you that Mr. Garrison, an old hand at it, and Mr. Hatfield, who has been in the insurance business for a long time, used one of the oldest devices they could to make us think the Smead statement looked genuine. What was it? It is being done every day by insurance investigators here when they are not sure that a witness will stick with the story that they have gotten out of him. They make a purposeful mistake in the text of the writing, and then when it is read over, "Oh, I am wrong on that. It is Los Angeles and not San Francisco. Will you change that and initial it, please?" They go down, page by page, and then some time in a Court of law they say, "How can it be false? The man read it over. Look at these corrections he made and initialled

himself." It is an old, old device, but it does not prove that the document means anything or has any reliability.

I won't go over all those statements there that they made. You heard enough, I am sure, Your Honor, of the statement about the receivables, and about the amounts owing at that meeting. But what happened after that? Again I will go over quickly. Smead went to California. Lotz went over to Chicago to nail down his deal, telling them he had come from New York just a day or two before and they could not make the same concession to him, so he is ready to go ahead with Mid-States. But Smead is [1157] in a few days phoning out there, or they are phoning to Smead from New York, and they learn that the collections have not come in except a dribble, and the vaunted bank loan of \$100,000.00 is languishing. There are no hopes. Mr. Hart and Mr. Feller have some important business in Los Angeles on a trip they were making then. They diverted it long enough to come to Oakland to see the situation. And you know what transpired there. They verified the fact that there had been collections of only about \$8,000.00, where much more should be in. They spent some time at the bank and found you couldn't get a loan there, at least it was not forthcoming then. So what did they do? They cancelled the agency. Why did they cancel the agency? Obviously, it was going to be completely inactive. The deal that Mid-States had been willing to give to get this business, they could not match. It then became a question of getting their money and what

do you think went through the heads of the men in the American Plan and American Fidelity and Casualty?

For one thing they knew they were on the outside looking in. They had no preference at all in the mind of Joe Lotz. Joe Lotz was going ahead with the Mid-States because of a deal he absolutely had to have to keep going.

I propose to pick up this agreement that was prepared by Mr. Feller and signed there on August 22nd, and what I will call the \$1,000.00 letter to Smead and the conduct of events thereafter [1158] and see if it spells out a fraudulent conspiracy. First, Your Honor knows that there is a presumption of innocence of fraud set up in the Code of this State. 1963, Sub-division 1, says, "There is a presumption that a person is innocent of crime or wrong." The Brill case in 38 Cal App 2nd says, "A presumption of innocence is applicable in civil as well as criminal cases." And the Peabody case, 52 Cal App 2nd 581, is one and the most recent of many, many analyses of this—and I will quote the language of that case:

"One of the strongest indisputable presumptions is that a person is innocent and that the law has been obeyed."

Now, we are not relying on the presumption, Your Honor, but we do pray the Court to approach it putting the horse ahead of the cart instead of otherwise. Let us look at these facts and see if they spell an honest intention and lawful proceedings on the part of these people rather than the dis-

torted one that is attempted to be ousted in position, the presumption of guilt rather than innocence, and let us think of that, not as being supported by any people of the kind you normally meet on the street, but it is supported by Smead, that unsavory character. That is all.

This agreement and this letter were drawn in longhand by Mr. Feller in his hotel room on the night before they had a date. I am sure that agreement was conceived in fraud and dishonest [1159] concealment, the agreement would not have read as it does now. It would have been full of hedges, escapes and everything else. On the contrary, it was done with complete openness. It was typed up at the bank and a copy of it was left at the bank. The plaintiff points in that agreement to this language:

“Commencing immediately all premiums received by Lotz will be deposited directly to the account of the company at the Central Bank, Oakland, California.”

Now, they mean by that, they say, that every nickel of premium Joe Lotz got from any source was to go into the Central Bank. This is what I called a strained construction.

Let us go back historically and see what happened. We have the Mid-States Company, a company that recklessly extends credit and permits a complete destruction of the trust character of their funds, to permit agents to float on it, to pay off every kind of obligation he has got and to coast as long as seventy-five days before he has to pay up, and then to get behind thirty and even sixty days. On the

other hand, we have the company that wrote this agreement, through their attorney, and they deprecate that kind of thing. They say it is not sound, and in May and in July officers of our company were telling this man, Lotz, "That is no way to run your business." What did they mean when they said, "Commencing immediately all premiums received by Lotz will be deposited directly to the account of the company at the Central Bank"? They were going to [1160] see to it that the premiums that came to them were not diverted to these uses of Lotz. That is all it meant, and for them to try to squeeze out of that, what was the trouble according to Mr. Hart and Mr. Feller who were there on August 22nd? It was simply the man had gotten into trouble by that very thing and they were going to see it stopped.

As far as their premiums went, they were going directly into a bank so they were subject to draft by New York, and they referred during their examination to this part of the agreement, paragraph 8, the first sentence of it:

"The manager hereby appoints Ralph L. Smead as representative and Lotz agrees said representative shall have full authority over the finances of the agency, and in connection with the matters referred to herein subject to instructions of the manager."

It is only in addition to verifying the agreement they are taking from these people who have been brought up on float to get those trust funds of theirs, their premiums over into a bank account im-

mediately upon collection so they could not be diverted as Titus and Hatfield were willing that their funds be handled.

Here is another point, Your Honor, and to me it is the most compelling one. When men act in a conspiracy that is an illegal one or is designed to cheat and defraud someone else, you look for and you find their motive of gain or advantage [1161] of some type, and referring to both Mr. Smead and Mr. Lotz, I feel like challenging these people to show one single advantage coming to Lotz by the contract that was entered into on August 22nd wherein they agreed to see that their funds got collected quickly and put immediately into a bank.

Look at the situation, Your Honor, for just a minute. The prospects of the American Fidelity and Casualty Company at that moment were as dead as a dead mackerel in the Lotz agency. Mid-States was the fair-haired company. They were going to get all the business. Why? Because they will take everything Lotz writes. They have invited and encouraged him to increase his writings. They have told him, "Take \$15.00 out of every \$100.00 of their premiums right at the source for a prepayment, and we are going to give you another percent as long as you keep on writing more and more." What possible gain to Lotz and Smead to go into a nefarious deal of some sort with these people who were completely on the outside looking in? I say that is compelling to me because men act on a pattern of some sort. They do not go off on a tangent and do something that would be otherwise crazy.

What possible purpose of gain or advantage to Lotz in seizing premiums of the company that he was henceforth to look to to keep afloat?

Here is another consideration, this \$1,000.00 letter. The company in a sealed envelope made an offer to Smead and [1162] they said to him,

"You know, for the night work or leg work that you do when you are going to be out collecting premiums for the American Fidelity," that they no longer had any interest in, "—we will pay you \$1,000.00."

But, you know, Smead turned it down and he said, rather haughtily, "I will have no part of it." That was his testimony. What would happen if there was a real to *raise* Mid-States premiums? Wouldn't Smead have been right there saying,

"Give me \$1,000.00. Make it \$2,000.00," or something else, if he was doing something wrong for the benefit of a company that meant nothing to the agency any longer?

Now let us look for a moment at what I will call the well-oiled machinery of the conspiracy. Your Honor, it was anything but that. If they had proved conspiracy here, you would see the conspiracy operating. But what happened? You are faced from the moment that Hart and Feller left this town with the most vigorous, rugged, persistent collection methods that I have ever seen in my life. There were teletypes going forward every day, sometimes two and sometimes three times a day. They were riding him hard. They had to, and they did fight for their money. Does that spell out to Your Honor

a fraudulent conspiracy that had been entered into to accomplish without effort the very things that these men worked so hard for? And [1163] there is nothing wrong in that. In circumstances such as Lotz presented here, if a company is to survive, it must work hard to get its money.

There is the Public Service transactions, Your Honor. As Mr. Garrison said, the American Fidelity was definitely interested in the prepaid commissions due to Lotz out of the very large transaction with Public Service. That was business Public Service could not retain under the regulations in this State, and it was floating policies that were sometimes called on the street. They were available to anybody who wanted them, and Hatfield definitely wanted those policies. That is what he was after—more business. I am not spending too much time on that but the miserable Smead had one statement to make in that December affair when he said, “that the matter was broached to Mr. Hart while he was here.” And Hart said, “Don’t mention my name to Public Service”—the company that had the policies.

Hart denies this. Can Mr. Garrison suggest any reason whatever why the name of any company, whether they are interested in that business or not interested in that business, should be withheld from Public Service? I will bet Public Service was on the phone twenty times a day to move out that block of policies that they had to get rid of. Under the ruling of this Commissioner, there is no secret in that stuff, and for Smead, the coy, surreptitious

rascal to throw that in—you [1164] know Hart's denial rings true because it is perfectly ridiculous that a man should say, "Don't tell him that you talked to American Fidelity about the fact that they had a portfolio they had to get rid of." Of course not.

Now, there is the \$61,000.00 transaction that came at the very end. That was a block of A F & C policies. It was a flat cancellation. It was to wipe out the rest of our balance. I am just telling Your Honor in my humble view we are not called upon to ring up anybody and tell them what we are doing. Our policy gives us the right to cancel any policy for non-payment of a premium or for no cause at all. That is one of the characteristics of this type of insurance contract, and we can cancel one or we can cancel 100 of them or 1000 of them. It was the last transaction. It came at the very end of October. It was more than two months after the date that they said that the nefarious scheme of corruption was formulated in the middle of August. It had nothing to do with it. It could not have been anticipated. It hangs there all alone.

Let us pick up the \$61,000 transaction. When we cancelled flat, that could have been written in any company that is writing. We have not made an examination of the situation current on the insurance street in that date of 1951, but without going down there we know that one company was awfully anxious to get more and more underwritings out of this agency, and Hatfield wanted that \$61,000.00. There was a conversation between [1165] him and

Hart. There was a conversation between him and Hart on the subject and Hart said to Hatfield he was interested in picking up the \$61,000.00 cancellation, and he said very frankly, "*Jerry*," he (referring to Lotz) "has not paid us for the premiums." And Hatfield laughed. That is the significant thing. He laughed right into that record, and the next statement from Hart immediately following, "He told you that, I believe."

"Told you what?"

He means he has not been paying his premiums. And Hart answers, "Yeah."

You know, Mr. Garrison asks a question as if we had done some terrible thing. He said, "Mr. Hart, did you ring up Hatfield and tell him you were cancelling flat? Did you tell him you knew about Public Service?" As if we were a competitor and in respect of an agent where we are on the outside looking in; we have to go ahead and tell him all of our business. Is Mr. Hatfield telling us his business? Was Mr. Titus ringing us up? No. Although those parties are friendly, meeting at conventions, they are dealing at arm's length, if the Court please. And Hatfield, when he was finally moved in, the best he could do was to complain to Lotz that he had not been consulted first about the \$61,000.00 cancellation, and this was the first time that Lotz' authority to commit Mid-States had ever been challenged. [1166]

They charged us with concealment of insolvency. That to me, if the Court please, is almost naive. They charged us with concealment of Joe's insolv-

ency. We can ask the question first: Insolvency when? When was Joe insolvent? Before the trip to New York and Chicago or afterwards? If it was before, when did he come insolvent? If it was afterwards, when did he become insolvent, and when did we find out about it, if we did not tell you about it?

Your Honor, we asked for statements from Mr. Lotz that might have disclosed that thing if it were true, but what is the testimony of Mr. Hatfield and Titus? They deny that they were even curious about his condition, never asked for a statement of his finances. Mid-States' knowledge of his condition was at least equal and probably superior to ours due to their long association with Lotz and the fact that they had set up this float plan and had ridden along with Joe as he went bigger and bigger. Every means of ascertaining his condition were available to them equally with us. And I say they knew more because of these frequent check-ups that are made by company officers, sporadic or incomplete, but, as Cass said, and as I read you, he knew everything going on in that agency as long as he was there and somebody who supplemented or took his place undoubtedly kept up the same thing. Of course, they were getting their delays every day, day by day, week by week, month by month, but still they say they had their head in the sand and by some [1167] legerdemain, some crystal ball, we were able to find out something that they with all their means had not been able to find out and that were concealed from them.

Then there is the lost teletype message. I am jumping from point to point as quickly as I can in view of the limited time. That was another pitch of Mr. Smead's. That statement comes from him to the effect that he was asked by Hart to destroy certain teletypes that might involve him. You will note, and you did note from the testimony, that Smead never said that he did destroy anything but he said he was asked to.

Now, the so-called missing teletypes, if the Court please, have been laid in the hands of the Mid-States attorney before this trial ever started. Does that sound like any hold-out? Does that sound like any destruction? If it is true that Smead was asked to destroy these things, and if he claims that he did destroy them, then we have presented them with the information that they bring in here, and yet they turn upon us and hang and tie their kite to the testimony of Smead on that, where it simply won't hold together. They say we diverted Mid-States premiums to the payment of American Fidelity and Casualty Company balances due. I have treated of that subject, if the Court please, already, but I just want to add this. Mr. Garrison brought up the matter of what I understood to be a September balance of \$29,000.00 that was due to Mid-States from Lotz under their settlement plan that was then working on [1168] a sixty-day basis. And then there was an exchange of teletypes between Lotz or Smead and the American Fidelity and Casualty about whether they should pay the \$29,000.00 to Mid-States. Mr. Hart does not deny that. He said he

answered, "Sure, if you owe it to them, pay it to them." But look at the argument they make here, if the Court please. Anything we do is wrong. If Mr. Hart on hearing about the \$29,000.00 had said, "No, don't pay it to Mid-States, pay it to us," then it would have been paraded in this Court room as further proof of a fraudulent conspiracy to take funds of Mid-States and see that they got into the hands of American Fidelity and Casualty, but if we say, "No, pay it to the guy you owe it to," we are still wrong. Why? Because we were lulling them into a feeling of false security.

Your Honor, we can't do anything without being wrong, and that is the sense of that argument.

I will conclude in about five or ten minutes if Your Honor would like to give my larynx a rest at this point.

(Recess.)

Mr. Bronson: I told Your Honor I would conclude briefly and I will. Toward the end of November Mr. Hatfield came out here and, as Your Honor knows from the testimony and the exhibits, he took assignments of Joe Lotz and he took all the records and books of the agency and he did that in the knowledge of and with the advice to Mr. Lotz of Mr. Mead, his attorney, [1169] and as Mr. Mead explained, they were continuing to operate the agency under the hand of Hatfield and on a basis of some security to the Mid-States for the position they found themselves in with a large indebtedness due them. But the hand of Mr. Titus was visible the moment he came here. He got here on the 5th

of December, and that is the date the statements were taken. That I commented on already.

But there is another angle of this and a rather illuminating incident. We heard some testimony about a meeting in Mr. Garrison's office somewhere around the tenth or twelfth of December, 1951, if I am right. No one had yet said anywhere about taking the agency away from Lotz and closing it, any more than had been said at the time the statements were taken on December 5th, 6th, 7th, and, 8th, but at that time the Mid-States officials, whoever was here, wanted some additional concessions of control over the agency and they prepared some sort of writing that was presented to Mr. Lotz in Mr. Garrison's office at a time when Mr. Mead was there. Among other things that were contained in that writing was a right or a delivery of the keys of the post office mail box of the Lotz Agency to Mid-States, a sort of right of first raid on incoming mail or checks. Mead said in effect, "Look, there has been some talk of a suit here lately and we are not going to give you any further concessions if there is going to be any suit involving Lotz." And Lotz and Mead were asked to leave the room where this took [1170] place. They were out there for about ten or fifteen minutes and they were invited back, at which time it was stated on behalf of Mid-States there in that attorney's office, "There will be no suit." Thereupon the documents were drawn or signed and a letter which was presented or which was to be used in connection with getting access to the mail box was also signed. Your

Honor knows a few short months later there was a suit, and this incident recounted by Mr. Mead has not been denied in this Court room.

There was a final incident. Whether they were still holding out to Lotz that he was going to continue in business under their supervision and have a workout of some sort I do not know, but Mr. Mead said there was an opportunity to get a rewrite of the entire Lotz line of policies by some outfit known as the Curt Hickey Company in Los Angeles, and they told Lotz and Mr. Mead to go down there to Los Angeles and make the arrangements and promised a fee to Mr. Mead on that account, which he says was never paid, and that rewrite, according to the figures that were set out in the telegram and the letter sent back at Mr. Titus' request by Mr. Mead would have closed out the business then on the books, no matter what was done with the agency, at a loss of about only \$32,000.00.

In closing I say this, Your Honor. I am not here contending that Mr. Hart or Mr. Feller or anybody connected with AF & C are angels, that they are sprouting wings. They are business [1171] men and they are schooled in the school of business. It is a hard school. I say that they are entitled to the presumption of innocence, and I also say with humility that the weakest kind of evidence has been offered, that shambles of a statement of Smead's. There wasn't any fraud here that has been proved in any real sense of a preponderance of the evidence. There is only that statement and a lot of putting together of things to make something out of nothing. If the

American Fidelity and Casualty are guilty of anything it is two things. They had a reasonably prompt awakening about the condition that Joe Lotz was in and got out, and when they got out thereafter, they used vigorous, sustained efforts to get their money out of it. And I want to pause to say this, Your Honor. You may hold a policy of insurance, whether it is on an automobile, on your home, on your life, or on the life of someone dear to you. It is all written on the same basis. It is a spread of losses among many policy holders. One has loss, hundreds are without a loss, and the premiums collected in like amount from all pay for the losses and for the administration of the business that must attend to it. What is the duty of an insurance company? Its first duty is to its policy holders. It has got to see that the fund that pays the losses is held intact for the benefit of all policy holders, and the secondary consideration is the stockholders of the company that put the fund together in the first place.

Of course, it may be an explanation of the recklessness, [1172] the utter heedlessness with which Mid-States conducted this business until they finally found an avalanche pouring down on them that they had but one stockholder, one of the largest finance companies in the country, the General Finance Company. They do not feel that immediate concern that others do. So they came back in this fight to recoup themselves to a statement of Smead, that is all it is. I feel like paraphrasing old David Warfield: If they want their Smead, they can have their

Smead. Perhaps Mid-States or its officers feel a oneness with Smead by some unity of feeling or principal. That I do not know, but if it be so, I wish them peace in that beautiful union.

Mr. McKinnon: If the Court please, I assume that the case will be briefed at the conclusion of the oral argument and upon preparation of the transcript. That being so, and the time being late, I will limit my part of the argument to the utmost and I shall endeavor to complete the presentation of my phase of the case within twenty minutes. I should like first to discuss the Bank case very briefly. I confess, Your Honor, that I have been mystified by the Bank's case in this proceeding. The Bank seeks to recover here from the defendants the \$37,500.00 in this judgment of Mid-States vs. the Bank in what we call the Bank case. How do they present their case here? They could have presented it, I assume, by merely referring to the judgment, which by virtue of the consolidation of the two [1173] cases is a part of the record here.

They have not rested upon a presentation of the judgment, explained by the pleadings, but they have put on here in the course of some twenty minutes or thirty minutes during the past two weeks the appearance of a case against them and that, I say, has mystified me. It has mystified me because it has but the appearance of a case. The half hour or so of testimony presented here is a mild reflection, a miniature reflection of the eight-day trial that it took to present the Bank case during which, if the

Court please, counsel for the Bank spoke most eloquently, both through his pleadings and through his interpretation of the evidence, against any liability. I should say that he was quite right in the position that he there took because, if the Court please, the liability of the Bank to Mid-States has always seemed most ephemeral. Mr. McCallum seems to rely upon the theory that the authorization by a board of directors resolution not having been forthcoming to permit him to stamp the name of Mid-States on the checks, he committed an act of fraud and conspiracy against the Bank in presenting the checks. You will recall that a request had been made by him, by Lotz, of Mr. Hatfield for the authority and the response was this: Hatfield said, "I am not saying that we will not grant you authority, but I want to suggest that the simplest way to eliminate your problem would be for you to instruct whatever accounts you have that presently make their [1174] premium checks payable to Mid-States that, instead, such checks should be made payable to you. I am not saying we will not grant you the authority. I am proposing the means whereby you get the money into your account for us namely, by having the checks made payable to yourself."

The strength or the weakness of the Mid-States' case against the Bank is measured by this. He had the authority from his principal to collect the premiums, and the question was: How would he collect them? He was permitted to, and they suggested that he receive these premiums by checks payable

to his own name, and they merely withheld from him the authority to stamp their name on checks payable to them. In other words, if the bank had been held after an adjudication in that case, it would have been because the checks and the money came in to him by one means rather than by another, where the end result was not only authorized by the first principal but it was one of his chief duties to make that very collection.

Now, the judgment was stipulated to. In other words, Mr. McCallum is here in the position of having admitted an obligation to the Mid-States Company, which he protested most eloquently was non-existent throughout the course of the trial, and then on the basis of that non-adjudicated admission, saying he has thereby an action against us for that amount. The fact that the matter was not adjudicated, the fact that the payment was voluntarily made vitiates this case. His case against us [1175] is also vitiated, I suggest, by the fact that the act of Mr. Lotz, or his employe, Smead, in presenting the checks under those circumstances is not connected with the conspiracy in this case. Mr. McCallum seems to argue that because it was a part of the alleged conspiracy, namely, an act done in the carrying out thereof, then all the parties become liable for any consequences that might flow, even assuming for the moment that those consequences had been an adjudicated judgment. That does not follow.

There is no sign of a fraudulent intent on the part of Lotz under this letter in presenting those

checks. There is no liability or sign of fraud, and in particular no sign of any conspiracy, whether in New York or in Oakland, connecting this act with the objects sought to be obtained. It would be as if Mr. Lotz in carrying out the alleged conspiracy, in driving to Sacramento one day, struck a pedestrian with his automobile. The injury would have resulted from an act done pursuant to a plan but not by virtue of the plan. The casual connection would be entirely lacking. We will go further than this in the briefs, but I wish merely to point out what I think are two basic points which vitiate the case of the bank against us.

Now, when we come to the case of *Mid-States*, I wish to touch three or four points primarily, as my partner has indicated, from a legal standpoint.

At the outset of Mr. Garrison's argument I was extremely surprised to find him saying, at the close, that they are not relying here upon these funds being trust funds. They are not relying upon this man being a trustee as to those funds. They are not seeking to trace trust funds.

"Let him be a mere debtor," Mr. Garrison says. "Our case does not depend upon trust, the trust character of the funds." I cannot at this moment, if the Court please, measure the extent of this admission. I dare not accept it without reservation because I fear if I do, that when we come to the briefs, we will find that there is some very major reservation included in it because otherwise I cannot conceive of any basis for liability of the defendants in this case. Therefore I am going to

briefly sketch what I conceive to be the point involved, even though it apparently will be at odds with an admission here made.

The case, if the Court please, is based upon trust. The complaint alleges not only that this man, Lotz, was a trustee for Mid-States but that he held the premium funds that he collected on their business as trust funds, as fiduciary funds. Then it alleges the diversion of some \$151,000.00 of those trust funds by virtue of the conspiracy from Mid-States to American Fidelity. So that if Mr. Garrison's concession at the end is to be taken without reservation, then the entire case, if the Court please, has been tried on a theory totally [1177] foreign to the theory on which he now seeks to make the recovery. So I am going to take it on the basis of the pleading and on the basis of the theory upon which the case was tried and examine those for just a moment.

Trust, I venture to say, is the grossest misnomer as applied to those funds. Your Honor will recall there was a trust fund and an operating account. The monies collected as premiums went into the trust fund, almost always with the sub-agent's commission withdrawn prior. If not, then checks were drawn on the trust account to the sub-agent. The funds went out of the trust fund to companies, of which there were seven or eight, including the litigants here; funds went out to the operating account, they went from the operating account to pay the cost of the business, the clerks' salaries, the rent, and Mr. Lotz' own living expenses, his own with-

drawals. Monies went into the trust account by credits for commissions, money went into the operating account by commissions, by loans, borrowings by Lotz, money went from the operating account back to the trustee account, and so forth. We had open ends on both of those two accounts. As a matter of fact, if the trust account were a trust account, so was the operating account, because funds withdrawn from the trust account to another account in the hands of the trustee would naturally retain their trust character. So we disregard the two accounts and we say you have here funds in a trustee which the principal permitted [1178] him to use for sub-agents' commissions, for his own operating expenses, for his own personal use, irrespective of the character of them. You had permission to float, you had perpetual, almost perpetual delinquency, and letters and wires saying, "Pay me the money that you owe me." You had an obligation on the part of Lotz to pay the money. You know you do not collect it, something entirely inconsistent with trust.

And I just say to Your Honor let us imagine a bank which purports to be a trustee for a client. The client appoints the bank as a trustee to collect money for a building the client owns. The client says, "Transfer the collections to me gross. I will pay you a fee, but you have to pay me the rents gross." And suppose on the other hand that the man uses the funds to pay his salaries, to pay a man to go and collect the rents, to pay legal fees, to pay every variety of his own obligations out of

that with the knowledge of the client, and then add to this, if the Court please, further principals. Let us come back to this. We can carry the bank analogy in our minds if we wish or not. But let us come back to this: This man was a trustee for Mid-States. He was a trustee for American Fidelity, and six or eight other companies. He collected money for one, withdrawing part of it for commissions and operating expenses, and then for another and for another, and for another, and then money goes back out of that to companies, not, of course, in the ratio in which he collected it. I dare say there [1179] was not a single payment of it made by Lotz to an insurance company in this case which was identical with the amount then due it. No possibility of tracing at any given time this money which was in the account because of the commission. That I say is a portrait, not of a trust fund, but that is a portrait of a fund, the events concerning which merely measure the debt which is owing by the so-called trustee to the so-called principal on a given date.

If the Court please, these being debtor-creditor questions, what is the nature of the fund? How can it be maintained by a principal that the fund is sacred and can be traced if this indiscriminate use can be permitted? Suppose, for example, that the client of the bank permitted the bank to pay its own debt. Could it ever follow that money in the hand of the creditor of the bank? Obviously not, but the reason why it cannot, if it please the Court, is the fund has lost its trust character and merely

measures the debt on the so-called trustee to the principal. Money is trust or it measures debt. If it is trust it is sacred. The very first invasion by the subtraction of a sub-agent of his commission was an invasion of that fund. The first use thereof by Lotz to pay his operating expense was an invasion, and if there was any tracing to be done, the true tracing would be to trace to all those outlets.

If the Court please, Mr. Garrison at the conclusion of his argument says he is not going to trace. He does not have to [1180] trace, as a matter of fact, to maintain his position. That, too, mystifies me. I never saw a more labored effort to trace the Public Service money in my life. Check after check has been placed in here. The money came in here one day, small bank balances, a check made the next day to American Fidelity, and then down the line of that ledger, we have been carried time after time. If we do not have to trace here, why was the time of the Court consumed with this most elaborate tracing in the Public Service case? If we do have to trace it is because these are trust funds and, if the Court please, they are not trust funds. As a matter of fact, the Public Service so-called tracing is a selective tracing, if the Court please, taken out of the period of time of some eight or nine months in which this agent represented both of these principals. Why take the Public Service transaction and trace it? There's only one way to trace it, if the Court please, and that is to go back from the beginning, every dollar that went in, every dollar that went out, while it represented both companies, stop

the books on each invasion, and say, "Whose money was it that he took?" And every time a credit went to the account or commission went in, "Whose money was replaced and in what proportion?" Provided we can agree on a principal. But that is the only possible way to trace it. Trace it all or do not trace it at all.

The Public Service money is a selective tracing that is not valid. The Public Service money doubtless, if the Court [1181] please, if this hugely expense procedure were entertained, would be found to compensate for many a premium of American Fidelity that went to Mid-States in the era in which American Fidelity's premiums first began to flow into that account. So we say, if the Court please, Mr. Garrison's case alleges, was tried upon the theory of trust. Mr. Garrison's right of recovery depends upon trust in spite of the admission he make and we say there was no trust. These were debtor monies and therefore they did not have the sacred character which has been represented here to the Court.

Next plaintiff says, however, that Lotz was insolvent.

"You got paid, we did not. We suffered a loss, and now we sue you for the loss."

An insolvent, as Your Honor knows, may pay one creditor in preference to another. Business could not be conducted if that were not so. If that were not so, every time a creditor received the payment of his money he would have to put a contingent liability on his books in the absence of mak-

ing an inquest into the financial affairs of the debtor. Your Honor knows what the remedy is. If a man is insolvent and he pays one creditor compared with another, the remedy is to cause the creditor who has been paid to put back the money has has been paid if it has been paid within four months of a petition in bankruptcy.

The remedy in this case of the plaintiff, having discovered the loss in November, 1951, was to go back—they had ample time—and put this man in bankruptcy or assert the bankruptcy remedy and then an involuntary bankruptcy would have had to ensue. But instead of that, the plaintiff, if the Court please, took a tremendous gamble. The plaintiff said, "We will run it out. We will not assert the preference within the four months. We will liquidate the business and then we will hand the other creditor the bill." If the Court please, no such procedure is countenanced in the law. No such action lies.

I was going to comment on the proximate cause of the insolvency. My partner has covered it, and in view of the shortness of time I am going to pass them. My point in brief is these people knew that two things created an insolvency in Joe Lotz, the increase in the loss ratio and stoppage. No matter how high his loss ratio increases, if you do not stop him, he goes on, but the check kiter comes to justice when you stop him. These people knew he was using this money. They knew his loss ratio. They knew of it because of the sub-agents' commission and the operating expenses totalling some forty-

two per cent, he was suffering a twenty-seven per cent deficiency, \$27,000.00 out of every \$100,000.00. The proximate cause of his insolvency was known to him. They would not come out and say that they were even in doubt as to that.

Finally, I wish to mention the damages here. I have [1183] partly touched it here. Plaintiff seeks its entire net loss upon the completion of liquidation. Even if it were entitled to damages, if the Court please, they would certainly not have been that because the alleged fraud, even if it existed, was not the cause of that entire bill. There were two bases of the loss, if the Court please. There could not have been any other basis because there was no embezzlement here for the usual illicit personal purposes. Here the causes of the loss were the invasion of the premiums for sub-agents commissions and operating expenses and any money of the Mid-States net which may have come to American Fidelity which got paid. As to the former, the invasion for the commissions and expenses, the fraud could not possibly have been the cause of that loss because they well knew he was invading his funds for those two purposes. The other was the only possible thing that could have been attributed to any wrong purposes if they existed. In our briefs we will set out what we think is the limit of that by virtue of the concessions made, that is, by virtue of facts found in the exhibit prepared by Lester, Herrick & Herrick, the accountants for Mid-States, and we say that on the basis of figures presented there, the total possible net profits that could have come from

Mid-States to American Fidelity could not have exceeded \$65,000.00. The exigency of time prevents me from giving Your Honor the detail of that, but we will in our brief. [1184]

As to the special damages, they ask for the cost of liquidation. Under no circumstances could the cost of the liquidation be attributed to any wrong doing on the part of these defendants. These men, by virtue of their own balance sheet, I mean the balance sheet of Mid-States' accountants, were insolvent some \$79,000.00 or \$80,000.00 on July 31st, 1951. We were paid and we move on. They go on with their business. They are the principal to whom he refers at the end of the trail. The principal whom they represent at the end of the trail will naturally have the cost of the liquidation. If we are not liable as a creditor who has paid—and we are not, Your Honor, because there was no bankruptcy here—then we were not liable for the liquidation which was for the account of the principal at the end of the trail. And so, if the Court please, we say that this is a case tried not only on the ground that the agent was a fiduciary to the principal, an agent for underwriting and general purposes, but it was tried on the ground that the premium funds that were collected for the plaintiff in this case were sacred trust funds.

I refer Your Honor to the pleadings. The case on the entire evidence was tried upon the same theory. These were trust funds. The admission of Mr. Garrison was fatal to his case. That will have to be borne out in the briefs as they come. I cannot con-

ceive of how he can make the admission and save any part of his case. [1185]

In the second place, we say that one creditor getting paid when another does not, in the case of an insolvent, the remedy is bankruptcy and setting aside all payments made within four months.

Thirdly, we say that the Mid-States Insurance Company was well aware of the factors that were sending this man into bankruptcy: High loss ratio, high writings and estopping.

Finally, we say that to hand us the bill would make the exact opposite of what plaintiff says should happen. Plaintiff says that one man should not bear this bill of bankruptcy. If Your Honor should give a judgment to the plaintiff in the amount they seek, that would be the result. In the case of an insolvent, the entire loss, not a part thereof, as would have been adjudicated in bankruptcy, but the entire loss would then have been borne by the defendants, and the plaintiffs toward whom he was insolvent and to whom he owed this large amount of money would receive a complete replenishment of their entire funds, and no lawsuit whatsoever. No such function applies.

Mr. Tiedeman: Just a short statement on behalf of the defendant whom I represent. First, everyone who has testified as to Joe's character, there is no doubt of his honesty and integrity. Joe Lotz may have been guilty of negligence and bad judgment in regard to the conduct of his insurance business, but even those would probably not have resulted in plaintiff's [1186] loss if the plaintiff had coop-

erated with Joe under the agreement, that is the agreement in connection with Joe's assignments.

Now, the plaintiff alleges a conspiracy to defraud. It takes two or more parties to enter into a conspiracy, and I believe that considering all the testimony on this point, it is not reasonable that Joe is guilty of having conspired to defraud, because there was no motive or intent on his part. All he wanted to do was to pay the person who was pressing him the most for the money, and he did not achieve any benefit from paying one company. Prior to and up to the time when these unfortunate events took place, both Mid-States and the American Fidel were, as Mr. Bronson says, policy hungry. Both companies were urging Joe to write more business, and Joe, who was perhaps unmindful of the consequences, plunged right ahead, not realizing until too late that he was headed straight for disaster. Then when American Fidel pressed Joe for money, Joe's primary thought was to get this creditor off his neck. The solution, that is, the Public Service deal, seemed perfectly logical to him. He, perhaps unreasonably, thought that his reserves with both companies would take care of any possible deficit, and Joe actually believed, whether or not he was right, that he did hold large reserves in these companies through premiums and writings that on this retrospective plan would come into actuality in time. Now, his one motive and intent was [1187] to pay the party who was pressing him the most, and it is just as the old saying goes, the squeaky wheel gets the grease.

Joe was the general agent of both companies, and as such he had authority to endorse checks payable to his principals, both the American Fidel and Mid-States. Some of plaintiff's exhibits are letters between Joe and Hatfield. Mr. Hatfield urges Joe to have his sub-agents make checks payable directly to Joe to overcome any trouble Joe might have with the bank on this score. Your Honor will recall that Joe testified that one such sub-agent up in Chico, Jackson Motor Sales, consistently sent Joe checks payable to Mid-States alone, although such checks concerned policies of various insurance companies. He wrote for more than Mid-States or American Fidel. In such circumstances, if Joe were to operate under strict trust principles, he probably could not have operated at all. Your Honor has learned of the operation of Joe's trustee account and his operations account. You have heard how Joe would transfer funds from one account to the other, back and forth as required. You have heard Mr. Hatfield testify that as a general custom of the trade it is impossible for an agent representing several companies to maintain a trust fund for each company, and the one reasonable conclusion is that as to his accounts with these companies, this relationship was that of a debtor-creditor and not a trustee.

Now, the American Fidel and Mid-States were general [1188] creditors, and it would appear not to be wrongful for a debtor to pay one general creditor in preference to another general creditor. Joe knows that he owes Mid-States a lot of money

today. He admits this. He owes them hundreds of thousands of dollars. And Mid-States knows that it does not stand a chance of collecting from Joe alone because Joe, as we know is broke. He is flat broke. Mid-States put Joe out of business after the assignments and thereby ruined any chance they might have had to collect.

Then what is there left? Just the plan to set out a conspiracy to defraud between Joe and American Fidel because this is the only way the plaintiff has of recovering, and when Joe had assigned his business and the fund which was held to his credit by American Fidel over to Mid-States, you might wonder why he would do such a thing. He is just a little fellow, an ex-baseball player, trying to make a go of business, and he worked hard to get his business. He wasn't going to give it up just because someone asked for it.

The testimony of his attorney, Bill Mead, shows that Mid-States expressed the promise to help Joe keep his business going and not to start a lawsuit. When Mid-States first asked for the assignments, Joe refused and he would never have made those assignments except for the plaintiff's express promises. Such conduct on the part of the plaintiff was, well, it was just a sneaky and entirely reprehensible. [1189]

Shortly thereafter the plaintiff confiscated Joe's office, his records, put him out of business, had proceedings instituted by the Insurance Commissioner, and Joe's insurance license was suspended, that is, excepting for the restricted right feature

thereof. And what becomes of Joe? Now he is peddling mortgage insurance from door to door, just struggling to eke out a meager existence. We feel that Joe has been greatly damaged by the fact that Mid-States breached its promise to Joe, and I mean the promises given in consideration for the assignments, and we ask that you find that in such breach the plaintiff in fact repudiated these assignments and that they are of no effect now, and I am referring especially to one assignment in which Joe signed over certain funds he holds with the American Fidelity through earned commissions on premiums.

As to the case of the Anglo Bank against Joe, I think Mr. McKinnon has stated our case pretty thoroughly and as our cases coincide, I will adopt his argument as to that. Thank you.

Mr. Garrison: I would like an opportunity to answer some of the arguments of Mr. Bronson and Mr. McKinnon, but I cannot quite do it in five minutes. I do not want to impose on Your Honor's time. I could probably do it in fifteen minutes. I will follow whatever suggestion Your Honor has.

The Court: I will cooperate in whatever you wish to do.

Mr. Garrison: If Your Honor would let me impose on the time [1190] of the Court until ten or fifteen minutes after four, I will try to finish and we won't have to come back tomorrow. If somebody else also wishes to argue, we may have to come back tomorrow anyway.

Mr. McCallum: I will pass my opportunity and try to finish up today.

The Court: Is that agreeable to all?

Mr. Bronson: Yes.

Mr. Garrison: If I may work backwards, I will talk about Mr. McKinnon's comments first. The complaint alleges the facts as we found them. It sounds in fraud and it is based on a conspiracy of the defendants to defraud the plaintiff. We allege that the defendant, Lotz, was an insurance agent and that he received premiums and that those premiums are characterized in the law as trust funds, that he was the trustee of the plaintiff who held them in trust. We still maintain that that is true, and that the evidence so establishes, but we say, if Your Honor please, that that is not essential to recovery. We say that whether they were trust funds or not, the defendant Lotz, was our agent. He had a fiduciary duty to us. He broke that duty and therefore is liable.

Under Mr. McKinnon's theory, if we had such an agent, and if he had trust funds, and if he violated the law with respect to commingling or some other conduct with respect to those trust funds, and we sued him, they would have a perfect defense [1191] because they would say, well, the money lost its character as trust funds and therefore we are not liable to you because it was a debtor-creditor relationship. But they overlook the fundamental proposition that an agent, quite aside from the nature of his money, has an obligation simply by reason of the agency relationship. So we do not

want to involve ourselves in a lot of discussion here about trust funds when we do not think it is essential to recovery. Certainly we went into the conduct of the parties in handling of money from Public Service because that shows how the fraud was committed and it shows their action in respect to having money that belonged to the plaintiff, Mid-States. We did not do it for any purpose of tracing funds. We have not attempted to trace funds. We tried to bring to this Court and to Your Honor every bit of evidence we could find. We attempted to show how this fraud was committed. We have attempted to show as nearly as we could what happened to the money, but to that extent we did discuss the Public Service money and we showed that they got it. But that was not essential to our recovery. It was simply explanatory of the conduct of the parties.

Mr. McCallum is more interested in that particular transaction because that involves his cause of action and for that reason he was anxious to show those particular steps in the deposit of the money and the immediate withdrawal by the American Fidelity. But we do not propose to trace funds and [1192] never have. We say Lotz was our agent and that under the law his funds, premium funds, were trust funds. But if they lose that character because of some acts on his part, his duty as an agent remains just the same. Mr. McKinnon contends that they may be liable for some of our loss but not for all of it. I think he has overlooked the very fundamental proposition that where someone participates

with another in a wrongful act, and that the victim or innocent party suffers a loss, the Court does not attempt to pick out exactly what portions of that loss that may have been directly related to the wrongful act. The law says the innocent party is entitled to recover for all of his damages that properly flow from that wrong. So that if we have suffered a loss here, an out-of-pocket loss, which everyone concedes that we have, and it came about as the result of a wrongful act by Mr. Hart pushing Mr. Lotz and Mr. Mead around and taking our money, then we are entitled to recover for all the loss that proximately results from that wrong, and you are not going to say, "Well, we will give you this and we won't give you that because maybe this is more directly connected than the other."

If the Court please, the fundamental thing that we tried to argue in our objection to this evidence in connection with 1947, 1948, 1949 and 1950, and which counsel seems not to follow, is the fact that at the time in August when this meeting occurred in New York, Mr. Lotz' account with Mid-States Insurance [1193] Company was absolutely current and paid up. He did not owe Mid-States a dime. He did not owe them a penny until September, when they made the \$29,000.00 payment. Insofar as this fraud is concerned, insofar as what occurred between January 1st, 1951 and the end of that year, it does not make one bit of difference what the conditions might have been previously, one year, two years, three years before, the fact is that at the moment the American Fidelity came into Lotz'

office, Lotz was paid up with the Mid-States Insurance Company. His account was current, and had he been left alone there would not have been a loss. He was not headed for any disaster at that point. He was paying his bills and he had sufficient capital to function. But as of that moment, the American Fidelity started to write a larger volume than he had ever written before, and by August he owed them \$250,000.00. I submit, if the Court please, it does not make any difference what Mr. Donnelly might have told him four years before, or Mr. Cass two years or three years before. The fact of the matter is he was operating under this contract of 1951, his account with us was current, he owed us \$29,000.00, which was not yet due, and I say that this case must be decided on the basis of what happened in 1951 and not in 1949.

Now, Mr. Bronson apparently attempted to defend this case in his argument upon Mr. Smead. We have no case for Mr. Smead one way or the other. He was an employe of Mr. Lotz. [1194] We found this situation and there he was. We took his statements and we brought him into Court and we presented him and every bit of evidence we could find. The peculiar part about Mr. Smead is, the peculiar and unfortunate thing for Mr. Bronson is that so far as that statement is concerned, everything he says in there happened. The facts as they developed are consistent with what that statement says. The only things in that statement that are in conflict are the conversations, and Mr. Hart denies those conversations, but they struck me as ringing

fairly consistent with the plan as it actually developed. Mr. Smead, call him what you may, is a boy in comparison with Mr. Hart. He is a child in comparison with Mr. Hart. Mr. Lotz is a retarded adult in comparison with Mr. Hart. There isn't any question in the world that Mr. Smead told an untruth when he testified before the Insurance Commissioner and he repudiated these statements.

But let me ask one thing: Who was he employed by at that time? Who was his lawyer and who was paying his lawyer at that time? Not the Mid-States insurance company but Mr. Hart. He talks about our being in peace with Mr. Smead. We did not employ him; Mr. Hart did, and he worked for Mr. Hart for over a year. He worked for him, in fact, until they got his testimony under oath and then he did not work for them any more. So the marriage is not between us and Mr. Smead; it was between Mr. Smead and Mr. Hart. So I do not think it comes very well from [1195] Mr. Bronson to try to relate us to Mr. Smead when the facts are to the contrary. It to me was a very peculiar thing when Mr. Smead said not only had he had this pressure from Hart to collect this money but it had continued on right up until the time he went to work for him and had to get away from those statements that he made and he told Mr. Smead, Hart did, that he had to forget those statements. And isn't it a peculiar thing when Mr. Smead was going to Mr. Bronson and Mr. McKinnon's office to repudiate these statements and he told Hart about it, and Hart said, "You can't tell them the

facts because if you do, they won't represent me"—that is exactly what he said, and that is what I believe he said because they knew, Mr. McKinnon and Mr. Bronson, as I do, and Hart knew that they would not represent him if Smead told them the truth.

Mr. Bronson: That is Smead's testimony, not Hart's testimony.

Mr. Garrison: That is right. That is Smead's testimony, but Mr. Hart knew those gentlemen would not have represented him if Smead had told the truth.

But we are not dependent upon Mr. Smead's testimony in this case. Mr. Bronson makes quite a point of the fact that we are trying this case upon Mr. Smead's evidence. That is not the case at all. We are trying it on the facts as they developed, and you can prove this case without a single witness if you take the auditor's statement and if you take the correspondence [1196] that went between those parties, because the fact is that Mr. Hart got our money, and I do not care whether you talk about the New York meeting or you discuss the conversations in New York or the conversations in Oakland. They got our money and that is all there was to it, and if you did not have a single witness, that one fact alone convicts Mr. Hart. And the thing I said earlier and the thing Mr. Bronson glossed over very casually is the fact that when all of these things were done commencing on August 22nd, Mr. Hart and a smart lawyer from New York had made the fatal mistake of designating Mr. Smead as their

agent, and when the Public Service deal was made, and when they got these other premium collections, and when they made the American Fidelity and Casualty rewrite, Mr. Smead was their agent and they are chargeable legally with every bit of knowledge of everything that he did.

As a matter of fact, the very appointment of Mr. Smead by Mr. Hart was a breach of Lotz' fiduciary duty to the Mid-States Insurance Company because what did he do? He came in there and took an employe of Lotz and made him his agent and removed Lotz' authority from the financial aspect and made Mr. Smead their agent, in conflict with the interest of the Mid-States Insurance Company. So that thereafter whenever Mr. Smead talked to the Mid-States people he was talking to them as the agent of American Fidelity and Casualty and not as the employe of Mr. Lotz, and that in and of itself is a breach [1197] of the obligation of first Lotz to Mid-States, but participated in by Mr. Hart's actions, and that is why I say that if Lotz is liable because of a breach of his fiduciary duty, and if those breaches, innumerable as they are, were participated in by Hart, then the law is very, very clear that that person likewise shares the responsibility.

Just picture Mr. Hart on the one hand, this aggressive, hard-driving, successful man and this boy, Smead, and Mr. Lotz. Imagine those people sitting down and attempting to work out a problem. You can well understand why the thing went the way it did. They were weak. They yielded to this pres-

sure, and they got themselves into a tragic misfortune. There is no question about that. But the motivating, driving influence was Mr. Hart and his desire to get his money.

Mr. Bronson alludes to the fact that Mr. Lotz in his operation was such an almost tragic affair that it was just pathetic. He was living on everything—borrowed money, his writings were substandard, and it was almost a crime for him to continue to operate. Well, that would be all well and good except for one rather significant thing and it happens to be in writing, and it happens not to be subject to Mr. Hart's denial, and that is the letter that Mr. Sudekum, an officer of the American Plan, wrote to Mr. Markel, the Vice President of the American Fidelity and Casualty Company. This, Your Honor, is dated in April, 1951, two months before the August meeting. [1198] This is three months after the American Fidelity started writing in the Lotz office. Mr. Sudekum wrote to Mr. Markel:

“Dear Stanley: The above account” (referring to Joe Lotz) “is an extremely active account in the State of California, giving us a considerable amount of premium income. The account has been with Mid-States for a great many years and has established an enviable record. During his visit to California recently Mark Hart was requested to grant the account a seventy-five day premium payment addendum. We can only highly recommend you to grant this request, and we would appreciate your early permission to issue the necessary addendum.”

That is the same agency that Mr. Bronson de-

scribes as being so shabby and operating on borrowed money and writing substandard business and so on. But it was a good enough account for Mr. Hart to come in there and give him a seventy-five day credit period when Mid-States had been giving him only a twenty-five day credit period. The vice, if any, from credit periods, resulted from the first extension that Mr. Hart gave them.

If the Court please, the case here seems to be one where, according to Mr. Bronson we are dealing in a hard school where the toughest survive and the Lord help the weak. He says this is an arm's length business. This is the hard school of [1199] business and they do not have to disclose anything to anybody, and so on. Well, he has overlooked some very significant pronouncements of the United States Supreme Court, our Courts of Appeal, our District Courts and our State Courts. The insurance business is not in the same category as an auction house or a secondhand store or the marketplace as such.

The insurance business is affected with the public interest and the Court's have said the public has an interest in the conduct of that business, and for that reason they have established a very carefully prepared set of rules by which the insurance business shall be conducted, and they have imposed upon the agents in the insurance business a higher degree of duty than is imposed upon others. They have characterized their funds as trust funds. They license people to carry on the insurance business, and they have tried to remove insurance from this school of hard knocks where you can get what you can against

the other fellow, and the crime is not in doing wrong but in getting caught. So I think Mr. Bronson has misquoted and done a disservice to the insurance business because it is not conducted on that basis. It is conducted for the most part by gentlemen whose word is good, and he was not out trying to cheat someone else.

He also lays great stress on the fact that the Mid-States Insurance Company were asleep, or I think he used the term "were more somnolent" at one time. He also said in his argument [1200] they did not know what they were doing. The Mid-States Insurance Company had no reason during 1950 and 1951 to make any inquiry regarding Mr. Lotz because their accounts were current and paid up. Until they had some knowledge that could have put them to the duty of investigating, they had a perfect right to assume that he was going to obey the law and that he was going to obey his contract, and they had no duty to make any inquiry into Mr. Lotz or to anticipate Mr. Hart was going to come in there and do this thing which was done, and they had a perfect right to accept Mr. Lotz at full face value.

Justice Traynor, in *Seger vs. Odell*, used this language and I think it fits here very perfectly. It says:

"No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool."

18 Cal 2nd, 409. In the same case it says, "Negli-

gence is no defence to an intentional tort," and it cites Frazer on Torts, California Jurisprudence. In the Heckler vs. Donnelly case, the Court said, "The law does not applaud fraud and condemn the victim for his credulity." If we are in a situation where one fellow, by being fortunate in having the first check bounce, and an insolvency that results from his actions, his writings, his increased volume, who gets in there first, and in less than a month has taken out of that agency \$140,000.00 by being more aggressive—if that is the test by which the insurance [1201] business is conducted, then the Insurance Code had better be re-written. I do not think Mr. Hart would like to have the Insurance Commissioner of this State know that their business conduct is based upon the proposition that if you get there first, you get your hands on the money; if not, though it is somebody else's, that you can't ever be required to return it. That is not the insurance business as I believe it is being administered in this State, and I do not think Mr. Hart would subscribe to that one minute because if he did, his company would be out of this State immediately. That is not the insurance business, if the Court please, and quite aside from the higher duty imposed upon the insurance company, if you put it to the level of the commonest agent—and I happen to have read a case in this court involving the duty of an agent to his principal—and you strip it of its fiduciary aspects, don't think about the question of trust funds at all, but simply show that this man is my agent, that man owes me fair dealing, disclosure,

honest treatment, and if anybody comes along and induces him to defraud me, they are both liable.

They talk about this business of paying the first creditor first, and there is no problem if you have a debtor-creditor relation, if you pay the first creditor in preference to another creditor. That is not what we have here. In this case Mr. Hart by his actions created the very indebtedness in the Mid-States Insurance Company out of which he got his account paid. The [1202] money was not there, and he simply got paid himself and let Mid-States wait. He created, through the Public Service trick, through taking the Public Service business and putting the liability on the Mid-States Insurance Company he created the very liability out of which the money came that he himself used to pay his account. That is a conspiracy to defraud. It is not paying one creditor in preference to another. It is the creation of a liability on one principal and taking the product of that liability and paying the account of another and that, if the Court please, is pure, unadulterated fraud.

One thing more and I will close. We do not, by the fact that I have not tried to argue, waive our allegation of punitive damages. The cases hold that where a plaintiff suffers as a result of a plan and a scheme to defraud, that the Court in its wisdom can award punitive damages if it finds that there was such a plan and scheme. We think there was here. We believe, even if we were paid our out-of-pocket loss, it would not be adequate, and we believe in this case that Mr. Hart should be penalized

over and about our actual loss by a finding of this Court of punitive damages. I am sorry I took so long.

The Court: What is the next order of business, gentlemen?

Mr. Garrison: We submit the case, if the Court please.

Mr. Bronson: Our case is submitted, American Plan and American Fidelity.

Mr. McCallum: Submitted. [1203]

Mr. Tiedeman: Submitted.

The Court: It is submitted all around. You have been talking about briefs here; what about the briefs?

Mr. McKinnon: I believe the case should be briefed, if the Court please. I do not think it is fair to the Court to present such complex issues without having a record of them on a brief of thirty or forty pages where Your Honor can review them. I think it would be an inadequate presentation without such a brief. For example, we have responses to make to Mr. Garrison's points. It is hard for me to contain them. We can't go on here forever. We can put them on a piece of paper.

Mr. Garrison: Nobody is arguing that. I am perfectly agreeable. If the Court wishes briefs, we will present briefs.

The Court: What is your thought?

Mr. Garrison: I will make a self-serving statement. I think the case is so clear it can be decided without briefs.

The Court: I do not think so.

Mr. Garrison: I think it is a long trial and it is a complicated case and we will be very happy to submit briefs. We will do it on any basis that the Court indicates.

The Court: I will adhere to whatever wishes you gentlemen indicate.

Mr. McKinnon: May I suggest thirty, thirty and fifteen after the transcript is prepared, something of that kind. Is [1204] that all right?

Mr. Garrison: That is a long time in the future. We have ordered a transcript.

The Court: Let me inquire.

(Conversation with reporter.)

The Court: It needs further perusal. I might say to all of you I have not made up my mind. I sympathize with the jury you gentlemen might have had. I am rather frank about these matters. There is some comment I might make now. It might be helpful. But I will put you gentlemen to work to make the most of your own cases. I should like, if possible, after the transcript has been prepared, to make it ten, ten and five.

Mr. McKinnon: Surely. We will have ours in in ten days.

Mr. Garrison: We will, too.

The Clerk: July 23rd for submission.

Mr. Garrison: I am assuming the first ten days will begin at the completion of the transcript, so that the first brief will have the advantage of the transcript.

The Court: I have made a pronouncement at the

outset of this case that might be interesting to you gentlemen. Somebody is going to be disappointed.

Mr. McKinnon: How does that ten, ten and five affect the intermediate gentleman?

The Court: I think they are agreeable to that.

Mr. McCallum: I assume we have the same ten days Mr. Garrison has. We file ours on the tenth day.

Mr. McKinnon: I just wanted to be sure we were clear on that.

The Court: That will go over to July 23rd.

Mr. Garrison: May it be stipulated that the party whose time is running out on the memorandum may have access to the exhibits and take them out so that both sides may have them?

The Court: I cannot refrain from making this comment, and I do not often engage in comments of this kind before I conclude, but this has been a real treat to me as a trial judge. Everybody came in here well prepared, and that is the reason I gave you full opportunity to present your cases and I want you to know I appreciate it, gentlemen.

Mr. Garrison: Thank you very much.

Mr. Bronson: I thank you.

Mr. Garrison: It has been very pleasant. Mr. Bronson and I have mentioned a number of times that we have enjoyed working on the case together, and everyone has had a feeling of camaraderie here.

Mr. Bronson: We do not know how long that feeling will last!

[Endorsed]: Filed Nov. 24, 1954.

[Endorsed]: No. 14695. United States Court of Appeals for the Ninth Circuit. Mid-States Insurance Company, a corporation, and The Anglo California National Bank of San Francisco, Appellants, vs. American Fidelity and Casualty Company, Inc., a corporation, American Plan Corporation, a corporation, Mark Hart, Joseph Lotz, Ralph L. Smead and L. Sudekum, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 19, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,695

MID-STATES INSURANCE COMPANY, etc.,
et al., Appellants,

vs.

AMERICAN FIDELITY AND CASUALTY
COMPANY, INC., etc., et al., Appellees.

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO, etc., Appellant,
vs.

AMERICAN FIDELITY AND CASUALTY
COMPANY, etc., et al., Appellees.

APPELLANT MID-STATES INSURANCE CO.
DESIGNATION OF RECORD AND STATE-
MENT OF POINTS

Appellant Mid-States Insurance Company adopts as its Designation of Portions of Record to be Printed its Designation of Portions of Record, Proceedings and Evidence to be contained in Record on Appeal, heretofore filed in the above entitled actions, as consolidated, in the District Court of the United States, for the Northern District of California, Southern Division, with the following addition:

1. This Designation of Portions of Record to be Printed and Statement of Points on which Appellant Mid-States Insurance Company Will Rely.

This appellant also adopts as its Statement of Points on which Mid-States Insurance Company Will Rely that Statement of Points heretofore filed by this appellant in the above entitled actions, as consolidated, in said District Court.

Dated: March 24, 1955.

/s/ LEWIS SCHIMBERG,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Appellant Mid-States
Insurance Company .

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 25, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

AMENDMENT TO DESIGNATION OF RECORD

It Is Stipulated by and between the parties hereto that this Amendment may be included and the following items be excluded from those Designations of Portions of Record to be printed heretofore filed:

Items to be excluded:

1. Exhibits 1 and 2 to Complaint in Intervention of The Anglo California National Bank of San Francisco, in action numbered 31496;

2. Exhibits 1 and 2 to Third Party Complaint of The Anglo California National Bank of San Francisco, in action numbered 31311;

3. Exhibits A, B, and C of Answer of The Anglo California National Bank of San Francisco in action numbered 31311;

4. Plaintiff Mid-States Insurance Company's Exhibit 17 in actions numbered 31496 and 31311 as consolidated;

5. Answer of defendant Joseph Lotz in action numbered 31496 (already printed in appeal No. 13756 in the United States Court of Appeals for the Ninth Circuit; referral to be indicated in index.)

Dated: March 29, 1955.

/s/ LEWIS SCHIMBERG,

/s/ WALLACE, GARRISON, NORTON
& RAY,

/s/ JOHN R. PASCOE,

/s/ MAYNARD GARRISON,

Attorneys for Appellant, Mid-States
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/s/ SEVERSON, McCALLUM & DAVIS,

/s/ NATHAN BERKE,

Attorneys for The Anglo-California National Bank
of San Francisco,

/s/ HAROLD R. McKINNON,

/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Appellees American Fidelity and
Casualty Company, Inc., and The American
Plan Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 30, 1955. Paul P. O'Brien,
Clerk.